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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~196~~ 25

W. B. AUSTIN, PLAINTIFF IN ERROR,

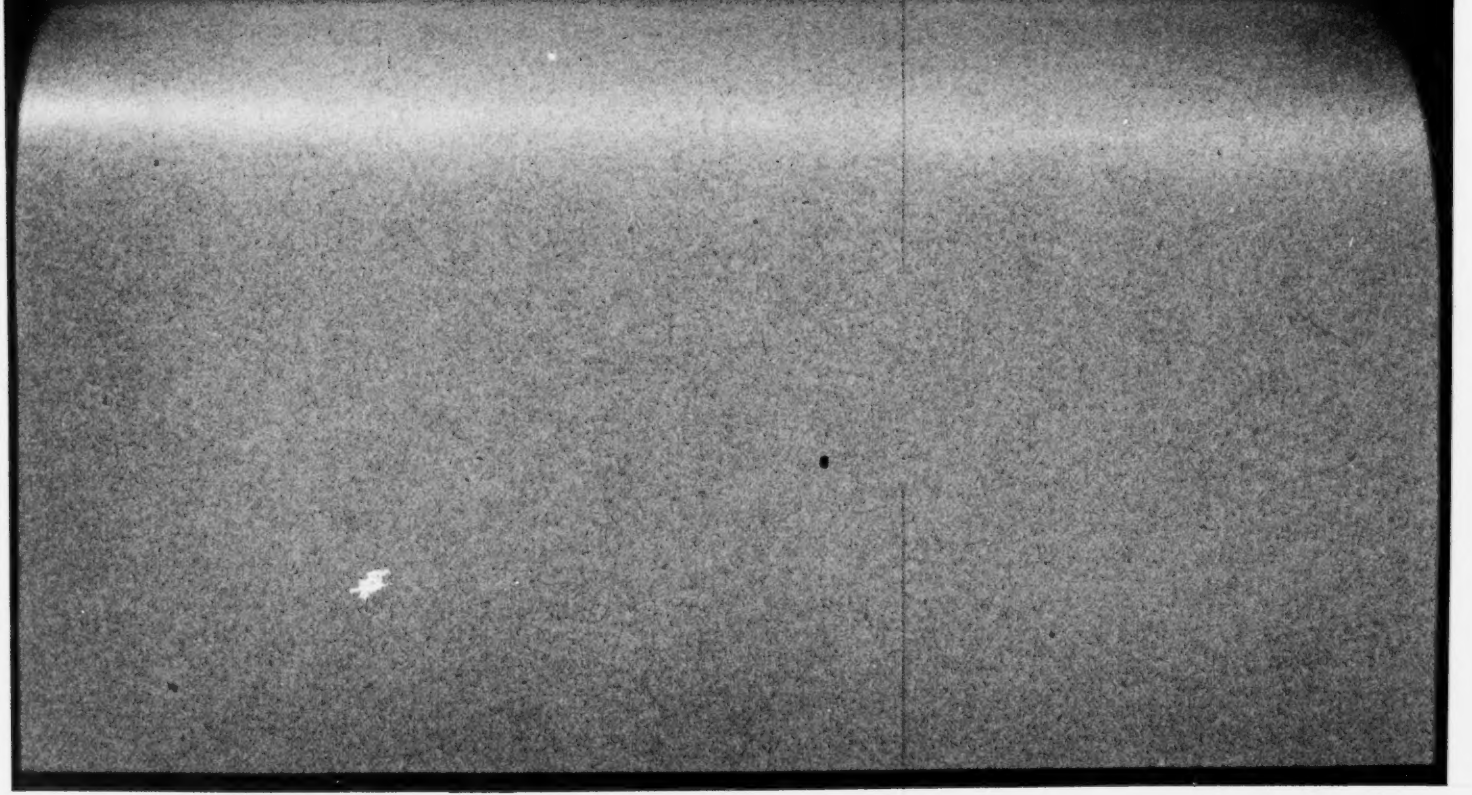
vs.

THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JANUARY 14, 1899.

(17,259.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 17, 1899.

a *State Cause.*

17th Circuit, Monroe County.

W. B. AUSTIN
vs.
THE STATE. } No. 4.

From the supreme court of Tennessee.

Filed September 2, 1898.

J. G. STUART, *D. C.*

1 MONDAY, *January* 17*th*, 1898, *A. D.*

Be it remembered that a circuit court for the county of Monroe and State of Tennessee was opened and held at the court-house, in the town of Madisonville, on the 3rd Monday of January, A. D. 1898, it being the 17th day of said month and the time appointed by law for the holding of said court—present and presiding, the Honorable Jas. G. Parks, judge, etc., of the 17th judicial circuit of Tennessee—when and where the following proceedings were had and entered of record, to wit:

WEDNESDAY, *January* 19*th*, 1898.

Court met pursuant to adjournment—present and presiding, the Hon. Jas. G. Parks, judge, &c.—when the following proceedings were had and entered of record, to wit:

Came the grand jury into open court in a body, headed by their foreman, W. L. Brown, and returned into court the following presentments, each of which are endorsed thereon a true bill and signed by each member of the grand jury, to wit:

STATE OF TENNESSEE
vs.
W. B. AUSTIN. } #664. S. Y.

MONDAY, *May* 16*th*, 1898, *A. D.*

Be it remembered that a circuit court for the county of Monroe and State of Tennessee was opened and held at the court-house, in the town of Madisonville, on the 3rd Monday of May, A. D. 1898, it being the 16th day of said month and the time appointed by law for the holding of said court—present and presiding, the Hon. Jas. G. Parks, judge, *and* &c., of the 17th judicial circuit of Tennessee—when and where the following proceedings were had and entered of record, to wit:

2 TUESDAY, *May* 17*th*, 1898.

Court met pursuant to adjournment—present and presiding, the Hon. Jas. G. Parks, judge, *and* &c.—when the following further proceedings were had and entered of record, to wit:

STATE OF TENNESSEE } vs. W. B. AUSTIN. } # 664. Selling Cigarettes.

Came the attorney general, who prosecutes for the State, and t defendant in his proper person, who being charged and arraig upon the indictment, for plea thereto says he is not guilty, and his trial puts himself upon the count-y; and the attorney general d the like; and thereupon, to try the issue joined, came a jury, to w W. S. Griffith, J. N. Hamilton, T. N. Webb, John McClung, W Bryant, C. W. Gregory, J. C. Alexander, Frank Airheart, W Walker, David McNabb, Geo. Carroll, and Joe E. Reagan, all g and lawful men, citizens of Monroe county, who, being duly su moned, elected, impanneled, and sworn, after hearing all the e dence and receiving the charge of the court, upon their oath say they find the defendant guilty as charged. It is therefore c sidered by the court that the defendant be fined fifty dollars, a that he pay all costs of this cause, and that he remain in custo until said fine and costs are paid or secured. Thereupon comes t defendant and moves the court for a new trial; which motion is the court overruled; to which action of the court defendant e cepts in law and prays an appeal to the next term of the supre court, at Knoxville, Tenn., and tenders his bill of exceptions, whi is signed, sealed, and made part of the record of this cause.

And the appeal is thereupon granted; and thus came defenda and along with him W. Morris Harrison, J. W. Culton, a
3 J. Parker, his sureties, who acknowledge themselves indebt to the State of Tennessee in the sum of two hundred a fifty dollars, but to be void if the above-named defendant sh make his personal appearance at the January term, 1899, at t court, to perform and abide by the judgment in the supreme cou and not depart the court without leave.

Bill of Exception in the Above-entitled Cause of Indictment.

In the Circuit Court of Monroe County.

STATE OF TENNESSEE } vs. W. B. AUSTIN. } # 664.

STATE OF TENNESSEE, } *Monroe County.* }

Circuit Court, January Term, 1898.

The grand jurors for the State aforesaid, being duly summon elected, impanneled, sworn, and charged to inquire for the body the county aforesaid, upon their oaths present that W. B. Aus heretofore, to wit, on the 1st day of November, 1897, in the coun aforesaid, did unlawfully sell cigarettes, against the peace and d nity of the State.

A. J. FLETCHER, *Att'y Gen.*

Endorsed: #664 Presentment. A true bill. W. L. Brown, foreman grand jury. Selling cigarettes. State of Tennessee — W. B. Austin. Clerk's summons for State: W. G. Brown, Horace Minnis, Tom Reynold. A. J. Fletcher, att'y general. Filed January 25th, 1898. G. W. Humphreys, clerk.

The following evidence: This defendant was on the 1st day of November, 1897, a resident of and merchant in the town of
4 Madisonville, said Monroe county, Tennessee, and in no way connected with the American Tobacco Company, as agent — otherwise; that just prior to said November, 1897, the defendant purchased, in the State of North Carolina, from the American Tobacco Company, a corporation of the State of New Jersey, and having a factory for the manufacture of cigarettes in Durham, N. C., and similar factories at other points in the United States, but having no factory, office, nor warehouse in the State of Tennessee, a number of packages, each containing 10 dates of Durham cigarettes; that these cigarettes were manufactured by the American Tobacco Company at its factory in said town of Durham, *and* etc., and these packed by it in quantities of 10 in pasteboard slide-boxes, upon each of which such box*es* or package*s* were printed the names of the manufacturers of the cigarettes therein contained, the name or brand of the cigarettes therein contained, the number of the factory and internal-revenue collections or manufacturing district in which said factory was located, the number of cigarettes contained in the box or package, the caution notice required by the laws of the United States, the internal-revenue stamp for 10 cigarettes pasted across the end of such box or package, so as to act as a seal thereon and thereof, and which had to be broken and destroyed to open said box or package, and *on* the other requirements of the laws and regulations of the United States governing the packing and sale of cigarettes. A package in all respects similar to those bought by defendant at Durham, N. C., is hereto attached, marked "Exhibit A." These packages were packed and manufactured by said American Tobacco Company at Durham, N. C., and were by it shipped from said town of Durham, N. C., to defendant by the Southern Express Company, without case, covering, or enclosure of any kind around or about any of said packages, but were by said American Tobacco Company piled upon the floor of its warehouse in Durham, N. C., and said Southern Ex-
5 press Company notified to come and get them, and said express company, by its agent, took them, the said enclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company; that these packages were brought to the place of business of defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket onto the counter in the place of business of defendant, and so delivered to and receipted for by the defendant; that said basket was not left with defendant at all, but was carried away from defendant's business by said agent

of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without br-aking, and sold one of them on said Nov. 1st, 1897, to W. G. Brown, an adult resident of said Monroe county, Tennessee, said sale being in Monroe county, Tennessee, and within one year before the finding of this indictment.

This was all the evidence.

The court charged the jury, but the charge, except for failure to give the instructions hereinafter set out as prayed, was not excepted to.

The defendant at proper time submitted the following request for instructions:

1st. If the jury should believe that the defendant sold to Brown a package of 10 cigarettes, which package had been bought by defendant at Durham, N. C., and shipped to him from Durham, N. C., without the enclosure, *there* the statute of the State of Tennessee forbidding the sale of cigarettes would be, as to such a sale, inoperative, as in conflict with the Constitution of the United States, and the defendant should be acquitted.

6 2nd. If the jury shall believe that defendant bought and imported from another State cigarettes and sold such cigarettes in one of the original packages in which imported and without breaking the same, you should acquit.

3rd. If the jury believes that all the facts testified to in this cause are true, then the court charges you that the statute under which defendant is indicted is, as applied to such a state of facts, unconstitutional, and the defendant should be acquitted.

4th. If the jury believe that all the facts testified to in this — are true, the court charges you that you should fine the defendant not guilty.

The court refuses to give any of said instructions, because the proofs show that the sale was not an interstate transaction, but a transaction between the citizens of the United States, and to the refusal of his honor to give said instructions defendant excepted, and excepted separately to his refusal to give each of said instructions respectively.

The defendant tendered this his bill of exceptions to the judgment of the court overruling his *realities* for a new trial; which is signed, sealed, and ordered to be made a part of the record.

JAS. G. PARKS, *Judge.*

7 STATE OF TENNESSEE *vs.* W. B. AUSTIN. } Selling Cigarettes. No. 664.

State tax	$5.00
County tax	2.50
Attorney's fee	5.00

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Clerk Humphreys, 3 dockets, 30c.; entry, 25c.; indct., 25c.; filing indct., 25c.; 2 cap's, $1.50; judg., 75c.; jury, 10c.; motion for new trial, 25c.; appeal bond and sec., 75c.; ord. granting ap'l, 25c.; bill cost, 50c.; trans. for supreme court, 3,000 words, $3.00; post., 25c.; orders, 50 cents	8.60
Sheriff W. R. Sloan, one arrest and bond, —; travel for officer, 90 miles, at 8, 7.20	8.45
Wit's W. G. Brown, 2 d	2.00
" Horace Minnis, 1 d	1.00
" Tom Reynolds, 1 d	1.00
	$33.55

STATE OF TENNESSEE, }
Monroe County. }

I, G. W. Humphreys, clerk of the circuit court in and for the county and State aforesaid, do certify that the foregoing is a true and perfect copy of the proceedings had and entered of record in this office.

Given under my hand and seal of court, at Madisonville, Tennessee, this Aug. 15, 1898.

G. W. HUMPHREYS, *Clerk.*

8 Filed Dec. 21, 1898. J. G. Stuart, deputy clerk.

W. B. AUSTIN }
vs.
THE STATE. }

Opinion.

W. B. Austin prosecutes this appeal in error from the judgment of the circuit court of Monroe county, whereby he was sentenced to pay a fine of fifty dollars and costs of suit for unlawfully selling cigarettes. He admits the sale, but denies that it was unlawful.

Austin, who was a citizen and merchant of Monroe county, Tennessee, purchased from the American Tobacco Company, a New Jersey corporation, at its factory in Durham, North Carolina, a lot of cigarettes, in packages of ten cigarettes each, which it shipped thence by express to him at his place of business, in this State, and there he sold one of these packages, without breaking, to W. B. Brown, an adult citizen of the same county.

The statute under which the conviction was had unconditionally prohibits all sales of cogarettes, whether manufactured in this State or elsewhere.

It provides: "That it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor,

punishable by a fine of not less than fifty dollars." Acts 1897, ch. 30, sec. 1.

Austin concedes that his sale to Brown was clearly within the prohibition of this act; yet he says it was lawful, nevertheless. The substance of his contention is that his sale was of an imported
9 commercial article in the original package, and *and* that the statutory prohibition, as applied to such a sale, is obnoxious to the commerce clause of the Federal Constitution and therefore null and void.

In considering this contention we raise two vital inquiries—whether or not cigarettes are legitimate articles of commerce and whether or not the sale shown in this case was of an original package in the true commercial sense.

1. Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.

There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, and the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true (Schollenberger *vs.* Pennsylvania, 171 U. S.; 1 Greenl. Evi., sec. 6; 1 Whort. Evi., sec. 282; 1 Jones Evi., secs. 129 and 134; Lanfeor *vs.* Masteor, 18 La. Am., 497; S. C. 89; Am. —, sec. 658 and note 693; State *vs.* Govette, 11 R. I., 592; Watson *vs.* State, 55 Ala., 158), nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them. Boullemet *vs.* State, 28 Ala., 83; 12 Am. & Eng. Ency. of Law, 199.

It is a part of the history of the organization of the volunteer army in the United States during the present year that large number of men, otherwise capable, had rendered themselves unfit for
10 service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other, reason.

It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea and alone for the protection of the people of the State from an unmitigated evil.

Such being the nature of cigarettes, they cannot be legitimate articles of commerce, and consequently are not within the provision of the Federal Constitution (art. 1, sec. 8, cl. 3) in relation to the

regulation by Congress of commerce with foreign nations and among the several States and with the Indian tribes.

Only those things which are in fact commodities in some true sense, and as such are proper things for importation and use, can be legitimate articles of commerce and within the scope of the constitutional provision *involved* by the defendant in this case. Regulation of traffic in things not suited for commerce was not by that provision delegated to Congress.

Every State has the right under its reserved police power to prohibit the importation and sale of all articles inherently unworthy of commerce and unfit for the use of its people. Indeed, an active duty rests upon the legislative branch of the State government to enact appropriate laws for the protection of the public against the hurtful influence of such articles, and in the discharge of that important duty the members of the legislature must be allowed to act in accordance with the dictates of their own best judgment.

This does not mean, however, that the State legislature may override congressional legislation on the subject, or that the State
11 has the paramount right to determine what is and what is not a legitimate article of interstate or international commerce. The reverse is true. Congress has the superior right in the determination of that question, and its decision when made is controlling; but if the question arises in the State in advance of congressional action, as in the present instance, the State legislature may and should act according to its own deliberate view of the matter, and its action when taken is and should be conclusive until Congress shall have given some adverse expression on the same subject.

We are mindful of the rule that the silence of Congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the States shall be free and unrestricted (Mobile *vs.* Kimball, 102 U. S., 691; Robbins *vs.* Shelly, 120 U. S., 492; Leisk *vs.* Hordin, 135 U. S., 100; State *vs.* Scott, 98 Tenn., 260); but congressional non-action upon the antecedent question as to whether or not other articles are suited for commerce is not tantamount to an affirmation by that body that they are so. Articles of the former class are already within the domain of congressional regulation, while those of the latter class are as yet beyond that domain and within control of the States, and, from the nature of the case, must remain so unless and until affirmatively determined by higher authority to be worthy of commerce and thereby transferred to the other class.

The right of a State to protect its people in their comfort, health, and safety against the importation and sale of non-commercial articles has long been recognized and never questioned by the Supreme Court of the United States. License cases, 5 How., 504; Bowman *vs.* Chicago, 125 U. S., 465; Hannibal *vs.* St. J. R. R. Co. *vs.* Husen, 95 U. S., 465; Leisy *vs.* Hardin, 135 U. S., 100; Plumley *vs.* Massachusetts, 155 U. S., 461; Collins *vs.* New Hampshire, 171 U. S., —; Schollenberger *vs.* Pennsylvania, 171 U. S., —.

12 In the Licence cases Mr. Justice Catpon observed that what belongs to commerce is within the jurisdiction of the United States, and that what does not belong to commerce is within the jurisdiction of the State, and by the State may be excluded from introduction. 5 How., 600.

The statute of Pennsylvania impeached in Schollenberger's case (171 U. S., —) was adjudged violation of the commerce clause of the Federal Constitution, because it prohibited the importation and sale of pure oleomargorine. In the course of his opinion in that case Mr. Justice Peckham attached controlling importance to the fact that pure oleomargarine, as contradistinguished from that which was adulterated, was a wholesome article of food and had been recognized by Congress as a commodity suitable for commerce, and, in recognition of the State's right to exclude the adulterated article, said: "The bad article may be prohibited, but not the pure and healthy one."

In Plumley's case (155 U. S., 467) it was said in effect by the court, speaking through Mr. Justice Harlan, that deceptive discoloration or adulteration of imported oleomargarine removed it from the domain of congressional regulation and subjected it to unconditional exclusion by State law.

The New Hampshire enactment involved in the Collins case (171 U. S., —) provided for the exclusion of all oleomargarine not of a pink color. It was held to be invalld for the reason that it virtually excluded pure oleomargarine, which was never naturally pink in color, and which was a proper and well-recognized commercial commodity.

The case of Leisy *vs.* Hardin, 135 U. S., 100, is the one most urged upon our attention by counsel for Austin. That case, however, like all the others, recognized the right of the State, under its police power, to prevent the introduction of non-commercial articles
13 among its people. Mr. Chief Justice Fuller distinctly places the court's decision upon the ground that the commodities whose importation and sale were so greatly restricted by the Iowa statute there examined had been recognized by the usages of the commercial worlds, the laws of Congress, and the decisions of courts as proper articles of commerce, and were therefore subject, in the first instance, to congressional regulation only.

In the conclusion of the opinion he said: "Whatever our individual views may be as to the deliterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognize as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulation while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

That case, then, as the others that declare State restrictions and prohibitions unauthorized and invalid, is distinguishable from the present on- in the fundamental and over-controlling fact that the articles there in question were commercial commodities in some

true sense, and as such appropriately recognized, while those here in question are not so.

Moreover, besides the conclusive recognition received by those articles, they stand upon a higher plane in respect of inherent merit than cigarettes, for they are confessedly beneficial in some instances and for some purposes, while cigarettes have no redeeming qualities. The Iowa statute upon its face distinctly acknowledged that the restricted articles possessed some virtue by allowing importations and sales of them for certain purposes and under certain restrictions.

In no instance has a State's right of authority and control been denied when the commodity restricted or prohibited was not first found to be a proper subject of commerce, and therefore
14 within the jurisdiction of Congress and beyond the jurisdiction of the State. The existence of that fundamental fact has always been the decisive criterion, and the burden of showing it is upon the complaining party.

All intendments are in favor of the constitutionality of every statute passed with requisite form and ceremony (Cooley's Const. Lim., 5th ed., 218; Black's Const. Law., sec. 28; Suth. Stat. Com., sec. 332; Railroad *vs.* Harris, 99 Tenn., 703); hence the burden is upon the person who assails a State's restrictive or prohibitory statute so passed as an unwarranted interference with interstate or international commerce to show that the particular article involved is a legitimate subject of commerce. If that fact be not made to appear in some appropriate way, his assailment must be unsuccessful.

Mr. Chief Justice Marshall, in Brown *vs.* Maryland, 12 Wheaton, 436, wherein a State statute was challenged for repugnance to the commerce clause of the Federal Constitution, remarked: "It has been truly said that the presumption is in favor of every legislatice act, and that the whole burden of proof lies on him who denies its constitutionality."

The same rule was announced and emphasized by Mr. Chief Justice Waite in this language:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is known beyond a reasonable doubt. One branch of the Government cannot encroach on the domain of another without danger.

The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Sinking Fund cases, 99 U. S., 718.

If there were only a doubt, then, that cigarettes are legitimate articles of commerce, that doubt would be resolved against
15 the defendant and this act would be sustained.

But, as already stated, they are clearly not so (as the court may judicially know, Schollenberger *vs.* Pennsylvania, 171 U. S., —), and the passage of the act is a legislative determination to that effect which must be treated as conclusive of the question, in the absence of congressional expression to the contrary.

Congress has laid a tax on cigarettes, prescribing the forms in which they may be put up and the manner in which they shall be stamped. Rev. Stat. U. S., sec. 3392. This was done, however, for purposes of revenue only, and, without more, was not a recognition of them as legitimate articles of commerce. It was no expression on the subject of commerce one way or the other. Indeed, all internal-revenue legislation is referable to a different provision of of the fundamental law (Const. U. S., art. 1, sec. 8, *ch.* 1), and should be construed as relating to questions of revenue only, unless obviously intended to include some additional subject, which is not true in this instance.

The fact that Congress has declared by general statute (Rev. Stat., sec. 3243) that the payment of any tax imposed by the internal-revenue laws for the carrying on of any trade or businsss shall not authorize the pursuit of that trade or business in any State forbidding the same, nor prohibit State taxation thereon, indicates unmistakably that Congress does not intend by the imposition of such special tax to reach, determine, or in any way affect questions appertaining to interstate or international commerce. The imposition of the tax is aside from all those questions.

The statement herein that the taxation of cigarettes is not a recognition of them as proper commercial commodities is sustained by the reasoning and decision in the case of Plumley *vs.* Pennsylvania, 155 U. S., 461.

2. Was the sale shown to have been made in this case a
16 sale of an original package in the true commercial sense? We think not.

It may be truly said to have been an original package for the purpose of taxation, because put up by the manufacturer, in the first instance, in one of the forms prescribed by the internal-revenue statute (Rev. Stat. U. S., sec. 3392); yet it was not an original commercial package, because not sold and transported apart from other like articles, but in the same general receptacle with them.

Speaking generally, we would say that an original package as applied to interstate and international commerce is a package, bundle, or aggregation of goods put up, in whatever form, covering, or receptacle, for transportation and as a unit transported from one State or nation to another.

In Guckheimer *vs.* Sellers, 81 Fed. R., 997, the court said: "An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment in the exact condition in which shipped. In the case of liquors in bottles, if the bottles are shipped singly each is an original package, but if a number are fastened together and marked or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or other receptacle constitutes the original package."

The supreme court of Iowa considered this question in McGregor *vs.* Cone, 39 L. R. A., 484, and upon the authority of numerous cited cases ruled, as correctly stated in the head-note, as follows:

1. An original package is that package which is delivered by the

importer to the carrier at the initial point of shipment in the exact condition in which it was shipped.

2. The determination of the internal-revenue department that a package is a proper and original package for purposes of taxation does not show that it is an original package of commerce.

17 3. A pine box, in which are packed for commercial shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal-revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce, and when that is opened the packages of cigarettes are subject to the police power of the State as a part of the common mass of property therein.

The material facts of the present case are that the defendant purchased from the American Tobacco Company, at its factory in Durham, North Carolina, a lot of cigarettes manufactured by that company at that factory, and there by it put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that after defendant's purchase the American Tobacco Company piled upon the floor of its warehouse in Durham, North Carolina, the number of boxes or packages sold and, having done so, notified the Southern Express Company to come and get them, and said company, by its agent, took them from the floor and placed them in an open basket already and previously in the possession of the Southern Express Company, and in that basket had them transported by express to the defendant's town in Tennessee, and there an agent of the same express company took the basket to the defendant's place of business and lifted from it on to the counter of the defendant the lot of detached boxes or packages of cigarettes, and thereupon took a receipt and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages without breaking it, and for that sale he stands convicted.

Under these facts it is entirely manifest to our minds that the basket with its contents made one original package in the

18 true commercial sense, each box or package of cigarettes being a constituent part thereof, and that the original commercial package was broken, and each box or package of cigarettes assumed a separate identity before the law when the basket was relieved of its contents.

This is true, though the basket was open all the while and was filled and emptied by the agent of the express company.

A box, crate, barrel, or basket filled with goods for shipment and actually transported from a citizen of one State to a citizen of another State is no less a receptacle of the good- in a legal sense, and such receptacle is no less an original commercial package because open and not covered.

The presence or absence of a covering to a receptacle so used is of no consequence in determining what is and what is not an original package.

In South Dakota *vs.* Chapman, 10 L. R. A., 432, and also in Rion

vs. Alabama, 10 L. R. A., 430, it appeared that whiskey in bottles separately wrapped had been packed and shipped in uncovered boxes furnished by the shippers, and the court held in each case that the open boxes and not the separate bottles were the original commercial packages.

The ownership of the basket used in the shipment involved in this case, whether in the shipper or the carrier, is not disclosed. If the defendant predicated anything of ownership in the carrier, the burden was upon him to show that ownership. To avail himself of the protection afforded by the Federal law in relation to the sale of original packages he must prove every fact essential to show that his sale was of such a package. Keith *vs.* Alabama, 10 L. R. A., 431.

But we regard the question of such ownership as wholly immaterial, for in taking the basket to the factory of the shipper
19 and there putting the cigarettes in it the express company's agent was acting for the seller, and the legal effect of his action was the same as if the basket had been procured and filled by the shipper alone.

It is perfectly obvious, moreover, that this plan of shipment was resorted to as a mere device for the purpose of evading the State law against the sale of cigarettes. Prior to the passage of this law, as is well known, no such scheme was adopted in the transportation of such articles, and the carrier was not called upon to play so unusual a part in such a matter.

Our conclusion upon the whole case is: First, that cigarettes are not legitimate articles of commerce, and, consequently, that their importation and sale are not within the scope of the commerce clause of the Federal Constitution, but are subject to State control and prohibition; and, secondly, that if they were legitimate articles of commerce, the sale for which the defendant stands convicted was not of an original commercial package, and hence was not protected by that clause of the Federal Constitution.

Since cigarettes are not legitimate articles of commerce and as such within the domain of congressional regulation, the statute here called in question is valid as a whole—that part which prohibits the importation and sale of cigarettes manufactured out of the State, as well as that part prohibiting the sale of those manufactured in the State—and the defendant's conviction is sustainable under the statute generally or under the former part, without reference to the question of original package; but if they were legitimate articles of commerce and the former part of the statute therefore invalid, the latter part would remain valid nevertheless (State *vs.* Scott, 98 Tenn., 254) as an internal police regulation (Kidd *vs.* Pearson, 128 U. S., 1; Mugler *vs.* Kansas, 123 U. S., 623; Plumley
20 *vs.* Massachusetts, 155 U. S., 461), and the defendant's conviction would be sustainable thereunder, because his sale to Brown was not of an original commercial package, but only of a part thereof after it had been broken and its contents thereby made subject to the laws of the State like other local property of the same

class. Leisy *vs.* Hardin, 135 U. S., 100; Schollenberger *vs.* Pennsylvania, 171 U. S.

We are aware that Judge Lurton, for whose opinion we have great respect, ruled otherwise in the case of Soire *vs.* The State, 82 Fed., 615, upon a record very similar to this one; yet we believe our conclusion entirely sound.

Affirmed.

CALDWELL, *J.*

21 Supreme Court of Tennessee, at Knoxville, September Term, 1898.

SATURDAY, *November 19th*, 1898.

Court met pursuant to adjournment.

Present and presiding: The Honorable Chief Justice D. L. Snodgrass and the Honorable Aswociate Justices W. C. Caldwell, John S. Wilkes, W. K. McAllister, and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:

W. B. AUSTIN *vs.* THE STATE. } Affirmed.

Came the attorney general on behalf of the State; whereupon this cause was heard upon the transcript of the record from the circuit court of Monroe county. After consideration by the court, it appearing that there is no error in the proceedings and judgment of the court below, the same is in all things affirmed.

It is therefore ordered by the court that the State of Tennessee have and recover of W. B. Austin the sum of $50.00, the fine assessed against him in the court below, and all the costs of this cause, and that he remains in the custody of the sheriff until said fine and costs are paid, secured, or otherwise satisfied according to law, and for the execution of this judgment this cause is remanded.

22 Office of clerk of the supreme court for the eastern division of the State of Tennessee.

I, Alex. McMillan, clerk of said court, do hereby certify that the foregoing is a true, perfect, and complete copy of the transcript of the record from the circuit court of Monroe county and of the judgment and opinion of the supreme court pronounced at its September term, 1898, in the case of W. B. Austin *vs.* The State, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in Knoxville, Tenn., on this the 24th day of December, 1898.

[Seal of the Supreme Court, Knoxville, Tenn.]

ALEX. McMILLAN, *Clerk*,
By —— ——, *D. C.*

Clerk, Alex. McMillan, making transcript..... 7.7
" " taking appeal bond, .50; fil'g pet., .25. .7

$8.4

Rec'd of J. Parker, att'y, 8.45, above cost.
ALEX. McMILLAN, *Clerk.*

23 Filed January 2, 1899. Alex. McMillan, clerk.

In the Supreme Court of Tennessee.

W. B. AUSTIN
vs.
STATE OF TENNESSEE.

Petition for Writ of Error.

To the Hon. David L. Snodgrass, chief justice of the supreme court of Tennessee:

Now comes W. B. Austin, the plaintiff in error in the above-entitled cause, by his attorney, and says that on the — day of November, 1898, the supreme court of Tennessee, being the highest court in the State of Tennessee in which a decision in the above-entitled cause could be had, entered a final judgment herein in favor of the State of Tennessee and against the plaintiff in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of the plaintiff in error, in that the validity of a certain statute of the State of Tennessee, constituting chapter 31 of Acts of 1897, having been drawn in question by the plaintiff in error, on the ground that they were repugnant to sec. 8 and sec. 10 of art. 1 of the Constitution of the United States, the decision of this court was in favor of the validity of said statutes and against the right set up under the said clause of the United States Constitution, as aforesaid, and this plaintiff in error was fined and made otherwise liable to penalty.

Wherefore said plaintiff in error, W. B. Austin, prays that a writ of error may issue in this behalf from the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, opinion, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that the said judgment and decree may be re-examined and reversed.

J. PARKER,
Att'y for Plaintiff in Error.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Ten-

nessee, at the fall term 1898 thereof, at Knoxville, Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between State of Tennessee, respondent, and W. B. Austin, appellant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause
25 of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said W. B. Austin, appellant, as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[The Seal of the Circuit Court, District of East Tenn.]

HENRY O. EWING, *Clerk*,
By J. T. CARTER,
Deputy Clerk of the Circuit Court of the United States for the East'n Dist. of Tenn.

STATE OF TENNESSEE, *ss*:

Allowed by—
D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

Filed January 2, 1898.

ALEX. McMILLAN, *Clerk*.

26 Know all men by these presents that we, W. B. Austin, as principal, and —— ——, as sureties, are held and firmly bound unto State of Tennessee in the full and just sum of ten hundred ($1,000.00) dollars, to be paid to the said State of Tennessee,

certain attorney, executors, administrators, or assigns; to whi payment, well and truly to be made, we bind ourselves, our hei executors, and administrators, jointly and severally, by these pre ents.

Sealed with our seals and dated this — day ——, in the year our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a supreme court of the State of Tennessee, i a suit depending in said court between State of Tennessee, r spondent, and W. B. Austin, appellant, a judgment was rendere against the said W. B. Austin that he pay a fine of fifty dollars an the costs of the cause, and the said W. B. Austin having obtaine writ of error and filed a copy thereof in the clerk's office of the sai court to reverse the judgment in the aforesaid suit, and a citatio directed to the said State of Tennessee, citing and admonishing to be and appear at a Supreme Court of the United States, at Wash ington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if th said W. B. Austin shall prosecute his writ of error to effect and a swer all damages and costs if he fail to make his plea good, the the above obligation to be void; else to remain in full force an virtue.

W. B. AUSTIN, [SEAL.]
By J. PARKER.
J. W. CULTON. [SEAL.]
J. A. ALBRIGHT. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

Filed January 2, 1899.

J. G. STUART, *D. C.*

27 UNITED STATES OF AMERICA, *ss:*

To the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear a a Supreme Court of the United States, at Washington, withi thirty days from the date hereof, pursuant to a writ of erro filed in the clerk's office of the supreme court of Tennessee, wherei W. B. Austin is plaintiff in error and you are defendant in error, t show cause, if any there be, why the judgment rendered against th said plaintiff in error, as in the said writ of error mentioned, shoul not be corrected and why speedy justice should not be done to th parties in that behalf.

Witness the Honorable D. L. Snodgrass, chief justice of the su preme court of Tennessee, this 29th day of December, in the yea of our Lord one thousand eight hundred and ninety-eight.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

28 I acknowledge service of notice of the within, & copy of same has been left with me.
This 4 Jan'y, 1899.

G. W. PICKLE,
Att'y Gen'l for Tennessee.

29 In the Supreme Court of the United States.

W. B. AUSTIN
vs.
STATE OF TENNESSEE.

Writ of error to the supreme court of Tennessee.

Assignment of Error.

The plaintiff in error, W. B. Austin, comes, by his attorney, feeling himself to be aggrieved by the findings and judgment of the supreme court of Tennessee in the above-entitled cause, and assigns errors thereto as follows:

I.

That the supreme court of Tennessee erred in holding and adjudging that the statute passed by the General Assembly of the State of Tennessee, and constituting chapter 30 of the Acts of 1897, under which the plaintiff in error was convicted in the circuit court of Monroe county, Tennessee, and sentenced to pay a fine of $50.00, was not, in so far as the act of the plaintiff in error for which he was indicted is concerned, in conflict with section 8 of article 1 of the Constitution of the United States, and in adjudging that he pay a fine as guilty and in default thereof be in custody of the sheriff of Monroe county, Tennessee.

II.

That the supreme court of Tennessee erred in holding and adjudging that the statute passed by the General Assembly of the State of Tennessee, and constituting chapter 30 of the Acts of 1897, under which the plaintiff in error was convicted in the circuit court of Monroe county, Tennessee, and sentenced to pay a fine of $50.00,
30 was not, in so far as the act of the plaintiff in error for which he was indicted is concerned, in conflict with section 10 of article 1 of the Constitution of the United States, and in adjudging that he pay a fine as guilty and in default thereof be in custody of the sheriff of Monroe county, Tennessee.

III.

That the said supreme court of Tennessee erred in holding and adjudging that cigarettes, for the sale of which plaintiff in error was convicted, are not legitimate articles of commerce, and are therefore not under the protection of section 8 or section 10 of article 1 of the Constitution, and that the regulation of com-

merce in said articles is therefore not within the power of Congress under said section of the Constitution of the United States, as aforesaid, but is under the power of the various States, and that therefore plaintiff in error was properly convicted of selling cigarettes in contravention of said act of the General Assembly of the State of Tennessee, it being chapter 30 of the Acts of 1897, although plaintiff in error had imported said cigarettes from another State and sold them in the original package in which imported.

IV.

That the said supreme court of Tennessee erred in holding that the package sold by plaintiff in error was not an original package in which imported, and that therefore the sale by plaintiff in error was not an act of interstate commerce, subject under sections 8 and 10 of the Constitution of the United States to only congressional regulation and not to the regulation and control of any of the States.

V.

That the validity of the aforesaid statute passed by the General Assembly of the State of Tennessee in the year 1897 having been drawn in question by the plaintiff in error as applied to the act for which plaintiff in error was indicted, on the ground that said statute so applied constituted a regulation of interstate commerce,
31 and was therefore in contravention of the United States, the supreme court of Tennessee erred in that its decision was in favor of the validity of said statute as applied to the sale by plaintiff in error for which he was indicted, and in holding and adjudging that the same was, as so applied, not in conflict with the said section of the Constitution of the United States.

VI.

And the said W. B. Austin prays that the errors so complained of may be corrected, and that the judgment of the supreme court of Tennessee may be reversed, annulled, and altogether held for nothing, and that plaintiff in error be discharged and restored to all things which he has lost by occasion of the said erroneous judgment aforesaid.

W. W. FULLER,
J. PARKER,
Atto's for Pl'ff in Error.

Endorsed on cover: File No., 17,259. Tennessee supreme court. Term No., 186. W. B. Austin, plaintiff in error, *vs.* The State of Tennessee. Filed January 14th, 1899.

3860

No. 25

No. 674.

3861

Office Supreme Court U. S.
FILED
APR 10 1899
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

Motion to advance.

W. B. AUSTIN

Filed April 10, 1899.

STATE OF TENNESSEE.

(MOTION TO ADVANCE HEARING OF CAUSE).

The above entitled cause is here by writ of error from this Court to the Supreme Court of Tennessee. It is a criminal case and involves the validity of an Anti-Cigarettes Statute passed by the Legislature of Tennessee. The Statute prohibits absolutely the sale of cigarettes within Tennessee. Plaintiff in error being indicted for violation of the Statute defended on the ground that the cigarettes sold by him were importations from another State, and therefore in their importation and sale subject to be validly regulated only by Congress. The trial Court denied the validity of his contention, and he was sentenced to pay a fine. The Supreme Court of Tennessee affirmed the judgment of the trial Court. The plaintiff in error applied for a writ of error from this Court on the ground that the Statute in question, in so far as sought to be applied to the act of the plaintiff in error, is in violation of the Inter-State Commerce Clause of the Federal Constitution. His petition

for writ of error was granted, and the writ issued on December 29, 1898.

The plaintiff in error now moves the Court to advance the hearing of this cause under Rule 26 of the Court, and gives as grounds for his motion:

1st. It is a criminal case.

2nd. Pending its decision, commerce within the State of Tennessee in a commercial article, as plaintiff in error contends, is virtually stopped.

3rd. Pending its decision, plaintiff in error is compelled to forego the exercise of what he claims to be his right, guaranteed by the Federal Constitution, to wit: to sell cigarettes imported by him from another State.

All of which is respectfully submitted.

W. W. FULLER,
J. PARKER,
Att'ys for plaintiff in error.

3863

No. 25

Brief for Plaintiff in Error

Filed Sept 18th 1899.

Office Supreme Court U. S.
FILED
SEP 22 1899
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

FROM THE SUPREME COURT OF TENNESSEE.

W. E. ADDELN

v.

STATE.

BRIEF FOR PLAINTIFF IN ERROR

IN THE SUPREME COURT OF THE UNITED STATES.

W. B. AUSTIN

vs.

STATE OF TENNESSEE.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a criminal case that is here by writ of error from the Supreme Court of Tennessee. It originated in the Circuit Court of Monroe County, Tennessee, and is based on an indictment by the grand jury of that county of the plaintiff in error for selling cigarettes. The statute that the indictment charged the plaintiff in error with violating is Chapter 30 of the Acts of 1897 of the General Assembly of Tennessee, the material portion of which statute is as follows:

> Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell or to bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than fifty dollars.
>
> Be it further enacted that the Grand Juries shall have inquisitorial power over offenses committed under this act.

There was a verdict of guilty by the Circuit Court of Monroe County, and the plaintiff in error was fined $50 and adjudged in custody until the fine was paid.

He appealed to the Supreme Court of Tennessee, and that Court, on November 19th, 1898, affirmed the judgment of the Circuit Court of Monroe County. The plaintiff in error prosecuted a writ of error from the Supreme Court of Tennessee to this Court, the writ of error having been allowed on December 29th, 1898, by D. L. Snodgrass, Chief Justice of the Supreme Court of Tennessee. On the same day the plaintiff in error gave bond, the amount of whose penalty and the solvency of whose sureties were approved by D. L. Snodgrass, Chief Justice. On the same day a citation was issued by Chief Justice Snodgrass, and service of the same was acknowledged by G. W. Pickle, Attorney-General of Tennessee. The plaintiff in error has filed his assignment of errors in this Court.

STATEMENT OF FACTS.

There is no contention as to the facts of this case: Plaintiff in error was a resident of and a merchant in Madisonville, Monroe County, Tennessee, in November, 1897. He was in no way connected with the American Tobacco Company, as agent or otherwise. The American Tobacco Company was at that time a corporation of the State of New Jersey, having a factory for the manufacture of cigarettes in Durham, North Carolina, and factories at other points in the United States, but having no factory, office nor warehouse in the State of Tennessee. In November, 1897, the American Tobacco Company manufactured at its factory in Durham some cigarettes, and packed these cigarettes into pasteboard

slide boxes; each box contained ten cigarettes and had printed on its outside the name and number of the factory, the internal revenue district in which said factory was located, the number of cigarettes contained in the box, the internal revenue stamp and "caution notice" required by the laws of the United States; the internal revenue stamp was pasted across its end so as to act as a seal on said box, and the stamp had to be destroyed before the contents of the box could be removed. The boxes of cigarettes in all respects complied with the requirements of the United States statutes and regulations governing the packing and sale of cigarettes. A number of these packages were by said American Tobacco Company shipped to the plaintiff in error from Durham, North Carolina, to Madisonville, Monroe County, Tennessee. The shipment from Durham to Madisonville was in this way: The American Tobacco Company piled on the floor of its factory in Durham, North Carolina, a number of these separate packages without any covering, box, bag or wrapping of any kind; an agent of the Southern Express Company, a common carrier which operated into and through the States of North Carolina and Tennessee, came and gathered up the packages and placed them in an open basket, which open basket was not theretofore in possession of the American Tobacco Company, but had theretofore been in possession of said Southern Express Company. These separate packages were by said express company brought in its car and in its basket to Madisonville, Tennessee, and there an agent of the express company took this basket full of these packages to the place of business of plaintiff in error and poured the packages from the basket onto the counter of the plaintiff in error and took the basket away with him. The basket was neither

delivered by the shipper to the express company nor was it delivered by said express company to the consignee. One of the packages thus received by plaintiff in error he sold, without in any way breaking or changing its form, to W. C. Brown, an adult resident of Monroe County, Tennessee. This sale was made on November 1st, 1897, and it is the only sale alleged or proven to have been made by plaintiff in error. There was no other testimony.

CONTENTION OF PLAINTIFF IN ERROR.

Upon the facts shown by the testimony and set out above, plaintiff in error contended in the Circuit Court of Monroe County that the statute under which he was indicted, so far as it was sought to be applied to his act and the sale made by him, was void, because in contravention of the Constitution of the United States, and especially of that clause of the Constitution of the United States which provides that Congress shall regulate commerce among the States. Plaintiff in error contended that the package of cigarettes sold by him was an import, and that by no act or change of condition had it lost its character as an import, and that therefore an attempt to forbid or regulate its sale by a State Statute is an invalid exercise by the State Legislature of a prerogative belonging exclusively to Congress. Plaintiff in error made these contentions by the submission, under the rules of practice of Tennessee, of requests for instructions embodying the contentions, but the Judge refused to sustain any of said contentions, or give any of the requests for instructions embodying them, giving as his reason for his refusal that the proof showed that

the sale made by the plaintiff in error was not an interstate transaction, but a transaction between citizens of the same State.

Upon an appeal of this case from the Circuit Court of Monroe County, Tennessee, to the Supreme Court of Tennessee, plaintiff in error made the same contentions, but the Supreme Court of Tennessee affirmed the judgment of the Circuit Court of Monroe County, giving as its reasons for said affirmance its opinion that cigarettes are not "legitimate articles of commerce," and that the package shown to have been sold in this case was not an original package in the "true commercial sense."

ARGUMENT IN SUPPORT OF CONTENTIONS OF PLAINTIFF IN ERROR.

Before entering into a discussion of what would ordinarily be considered the questions involved in this case, it is well to dispose of a question that but for the opinion delivered by the Supreme Court of Tennessee it would never have been considered necessary to discuss; that is, whether cigarettes are articles of commerce. The interpolation of the word "*legitimate*," in the opinion of the Supreme Court of Tennessee, may have significance or it may not. If it means simply "legal," it has no significance at all; for in a discussion by or before a Court the phrase "article of commerce" means an article *legally* recognizable as a commercial article. But the word "legitimate," as used by the Supreme Court of Tennessee, seems to carry with it a sort of moral meaning, as it were, and the Court's discussion of the noxiousness and injurious qualities of the cigarette would seem to indicate that its use of the word "legitimate" is

somewhat after the idea involved in the use of that word by parties who discuss whether liquor selling or money lending is a "legitimate" vocation.

A quotation from the opinion of that Court justifies this doubt as to its meaning in the use of the word "legitimate."

> "Are cigarettes *legitimate* articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether.
>
> Beyond question, their every tendency is toward the impairment of physical health and mental vigor.
>
> There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact.
>
> No particular proof is required in regard to those facts, which, by human observation and experience, have become well and generally known to be true (Schollenberger *v.* Pennsylvania, 171 U. S., 1. 1 Greenl. Evi., Sec. 6; Whart. Evi., 282; 1 Jones Evi., Secs. 129 and 134; Lanfear *v.* Masters, 18 La. An., 497; S. C., 99 Am. Dec., 658 and note 693; State *v.* Goyotte, 11 R. I., 592; Watson *v.* State, 55 Ala., 158); nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of

them (Boullemet *v.* State, 28 Ala., 83; 12 Am. and Eng. Ency. of Law, 199).

It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other, reason.

It is also a part of the unwritten history of the legislation in question that it was based upon, and brought to passage by, the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea, and alone, for the protection of the people of the State from an unmitigated evil.

Such being the nature of cigarettes, they cannot be *legitimate* articles of commerce; and consequently, are not within the provisions of the Federal Constitution (Art. 1, Sec. 8, Cl. 3) in relation to the regulation by Congress of commerce with foreign nations and among the several States and with the Indian tribes."

If this second suggested meaning of "legitimate" is its significane as used by the Supreme Court of Tennessee, its interpolation is unjustified. Whether or not an article is or is not an article of commerce is dependent, not on the question of its noxiousness or beneficence; it is not a question of opinion at all, it is a question of fact. Any article that men buy and sell is legally an article of

commerce, and as such, when commerce in it is interstate, and that commerce is to be regulated by Congress alone.

This contention does not deny the right of a State to protect its citizens against involuntary injury, or fraudulent sales. High explosives, or malodorous guanos, are articles of commerce, but their introduction into a State may endanger the lives and comfort of the citizens, and the State may therefore regulate, or perhaps prohibit, their coming. Putrid meat is an article of commerce; it is bought and sold as a fertilizer, or material for soap, but it is not fit to be eaten, and the State may, by inspection laws, provide against the fraud that might be practiced on its citizens by an offer to sell putrid meat as food. This right of the State, though, to pass inspection and quarantine laws, does not alter the fact that so far as being an article of commerce is concerned, any article that *A* has in his possession and wants to sell, and *B* wants to buy, is an article of commerce. We submit that expressions in some of the cases which refer to various articles, such as clothing from an infected district, as not being articles of commerce, have been made loosely, and the Courts that made use of such expressions meant by them only that articles such as those referred to, articles which by their very presence or transit endanger the lives or comfort of citizens, have no commercial rights superior to the police power of the State or municipality. This is unquestionably true, and it is upon this that State quarantine laws can be upheld.

It has been suggested, too, inferentially rather than directly, that the novelty of an article might preclude its right to be considererd an article of commerce. This suggestion cannot be material in this case, for cigarettes

are not novel; but the suggestion itself, it is respectfully suggested, is wholly unsound. The day after the typewriter was invented, and the day its manufacturer first wanted to sell and transport one of the new machines, the typewriter became an article of commerce. If its mere novelty, without other objectionable features, were to rob an article of its claim for commercial recognition, there might be a stopping of enterprise and progress.

The cigarette, however, is exempt from either of the objections referred to. Its transit through a State, or its stopping within a State, brings no danger nor discomfort to any citizen. It will not explode, it is not mal-odorous.

Neither is the cigarette a novel product and only heard of yesterday. It has been known to and taxed by Congress in the following enactments: June 30th, 1864; March 3d, 1865; July 13th, 1866; March 2d, 1867; July 20th, 1868; March 3d, 1875; March 3d, 1883; July 24th, 1897; and the War Revenue Act of 1898. It has been known in literature, certainly since 1845, when Joseph Baker, in a book published in London, had this to say in its favor: "The cigarette has but little strength, it can do you no harm." Its general manufacture and use in this country ante-dates the memory of most men, and in some other countries its beginnings are still further in the past.

The only test as to whether or not an article is a commercial article in which a right of traffic exists that has ever been before suggested by a Court, is whether it is recognized by the *commercial world*, the *laws of Congress* and the *decisions of the courts* as such. As said by this Court in one of its famous cases:

"Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of Inter-State Commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them." . . . "That ardent spirits, etc., distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of the courts, it is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State?" (Leisy *v.* Hardin, 135, U. S., 100.)

Cigarettes are commercial articles recognized (1) by the *comercial world*, (2) the *laws of Congress*, and the (3) *decisions of courts.*

(1). The commercial world certainly recognizes cigarettes as commercial articles. The very statute, for the violation of which plaintiff in error is indicted, shows that they are so recognized, for it makes it a misdemeanor, not only for persons, but for any *firm or corporation*, to sell cigarettes, and it makes it a misdemeanor also, for any person, firm or corporation to *bring them into the State* for the purpose of selling. The report of

the Commissioners of Internal Revenue for 1897 shows that during that year there were imported from foreign countries 4,312,360 cigarettes, and their annual output in this country, to say nothing of cigarette papers, will reach 4,000,000,000. There are large factories devoted to the manufacture, large warehouses devoted to the storage, and large stores devoted to the sale of cigarettes. They are, and have been for years, on the price-lists of wholesale tobacconists, and wholesale grocers. Whatever our opinion as to the benefit or harm that comes from their use, cigarettes are certainly known to, and recognized by, the commercial world.

(2). The laws of Congress recognize the commercial quality of cigarettes.

In the case of Schollenberger *v.* Pennsylvania, (171 U. S., 1,) oleomargarine was the subject of discussion, and oleomargarine has been recognized by Congress by just one single enactment, and yet the Court says, in discussing that commodity and that enactment:

> "Any legislation of Congress upon the subject must, of course, be regarded by this Court as a fact of first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we shall rightly be influenced by that declaration."

As shown above, Congressional legislation, in recognition of cigarettes as proper subjects of taxation, and therefore of traffic and trade, began June 30th, 1864, and by frequent enactments since, they have been recognized not only as proper subjects of taxation, but as subjects of tariff regulation as well. Now, it is not meant that the fact that taxes are paid on the manufacture or sale

of an article is tantamount to a declaration by Congress that no State shall interfere in the sale or manufacture of that article. The fact is that Congress has, by a general statute (Rev. Stat., Sec. 3243), declared that such shall not be the effect of the levying of an Internal Revenue tax. But the levying of an Internal Revenue tax is a distinct recognition of an article as a commercial article, for it would be monstrous to assume that the United States would tax and license the manufacture and sale of an article that was not and nowhere an article of commerce. And it is not only by the levy of an Internal Revenue tax that Congress has recognized cigarettes, but it has also made express regulations for their exportation and importation (Secs. 3385, 3387, 3396 and 3392, Revs'd Stats.). So far as Congress has ever recognized any article as an article of commerce, it has recognized cigarettes. It has provided for a tax upon their manufacture; it has provided regulations for their manufacture and sale; it has provided for their importation and exportation; and further than this, Congress has never gone in the recognition of any article. Plaintiff in error confidently contends, therefore, that this authorizes him to say that the cigarette has been affirmatively pronounced to be a proper subject of commerce by Congressional enactment.

(3). Not only, though, have cigarettes been recognized by the usages of commerce and the Acts of Congress, as commercial articles, but the decisions of the Courts are to the same effect: The first adjudication on the subject was in June, 1893, by U. S. Circuit Judge Hanford, in the unreported case of Washington *v.* Coovert. The case was appealed to the Supreme Court of the United States, but the appeal was dismissed on a

point of practice (164 U. S., 702). The State was the appellant, and the judgment of Judge Hanford was as follows:

> "Ordered, adjudged and decreed that the said law of the State of Washington, prohibiting the sale of cigarettes, referred to in the petition, is in contravention of Article 1, of Section 8, of the Constitution of the United States, and null and void, in so far as it prohibits, or attempts to prohibit, the selling, giving or furnishing to any one by the importer of a slide pasteboard box containing ten paper-wrapped cigarettes, said box having upon it the U. S. Internal Revenue stamp and caution notice required by law, also the number of manufacturer's district and State, which box was received by the importer from without the State of Washington, enclosed with other similar boxes in a common pine shipping case, and that the said M. L. Coovert to be by said George Nerton, Sheriff of Clark County, forthwith discharged from imprisonment and detention for the cause in said petition aforesaid."

In 1895, *In re* Minor was heard before Circuit Judge Goff (69 Fed. Rep., 233), and the Court in that case said, in part:

> "This act of the West Virginia Legislature inhibits the sale by the petitioner (unless he first pays a tax for the privilege to do so) of the original package of cigarettes, imported by him into the State of West Virginia from the State of New York, *while they are still articles of commerce*, and by the authorities I have referred to, that is not a proper subject of police power. * * * I

reach the conclusion that said section (the act under consideration) *so far as it applies to cigarettes* imported from another State into the State of West Virginia, and sold by the importer in the last named State, in the original packages, *is a burden upon commerce among the States, and to that extent in violation of the commercial clause of the Constitution of the United States.*"

In 1896, the Legislature of the State of Iowa passed a statute prohibiting the sale of cigarettes, and the validity of the statute was contested before Judge Sanborn, Judge of the United States Circuit Court. His judgment is reported in 76 Fed. Rep., 956, as follows:

> "The Iowa statute of July 4, 1896, prohibiting the manufacture or sale of cigarettes, etc., within the State, is void, as being an unwarrantable interference with interstate commerce, in so far as it applies to the sale of cigarettes imported into the State and sold in the original packages of importation; such packages being the usual pasteboard box, containing 10 cigarettes each, bearing the proper Internal Revenue stamp, and not inclosed in any other packages or wrappers."

Upon an amendment and re-enactment of the statutes of West Virginia, passed upon in Minor's case, the Supreme Court of Appeals of West Virginia delivered an opinion in exact accord with the opinion of Circuit Judge Goff, and cigarettes were held to be articles of commerce, and as such, entitled to all of the protections of the commerce clause of the Federal Constitution (State *v.* Goetze, 27 S. E. Rep., 225).

In September, 1897 the very statute that is involved in this case, to wit: the Statute of the State of Tennes-

see, was before Circuit Judge Lurton, and he, after quoting that part of the opinion in Leisy *v.* Hardin, which holds spirituous liquors to be articles of commerce, continues (Sawrie *v.* Tennessee, 82 Fed. Rep., 615):

> "So, in this case it must be recognized that the *cigarette is equally a well-known subject of barter, sale, trade and commerce,—so recognized in all the channels of commerce, and by the laws of Congress, which prescribe the original package for the purpose of taxation.* The question here, as in this Whiskey case, just cited, is: Whether, being an article of commerce, can the State of Tennessee, in the absence of legislation by Congress, prohibit their importation from a sister State? Or, when imported, prohibit their sale by the importer? No important distinction can be drawn between this case and *Leisy* v. *Hardin.* If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the State can be admitted, much more can be said, and was said, of the evils sought to be guarded against by the Iowa prohibition statute. If the traffic in ardent spirits is a recognized and legitimate subject of commerce, so is the traffic in the cigarette. If Congress has recognized the fact that the one is an article of traffic and commerce, by prescribing an original package and imposing a tax thereon, so it has recognized the other."

And yet Judge Lurton was not free from the prejudice that exists in some quarters against the use of cig-

arettes, for he concludes his opinion against the validity of the statute, with this sentence:

> "I reach this conclusion without any hesitation, though reluctant to even partially strike down a statute aimed at the suppression of an evil of most pronounced character."

The Supreme Court of Iowa, which Court is also not very friendly to cigarettes, had the question of the validity of a statute prohibiting the sale of cigarettes before it in January, 1898, and Chief Justice Deemer, delivering the opinion of the courts, says (McGregor *v.* Cone, 39 L. R. A., 484):

> "It seems to be well settled by the later decisions of the United States courts that, while the States have the undoubted right to control their purely internal affairs, yet whenever the law enacted in the exercise of this power amounts to a regulation of commerce among the States, as it does when it directly or indirectly inhibits the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one State and another, it comes in conflict with a power which has been invested in the general Government, and is therefore void. That the use of the article is deleterious to the inhabitants of the State is not regarded as material, so long as it is recognized by the commercial world, by the laws of Congress, and by the decisions of the courts, as a commodity in which a right of traffic exists. (Citing Brown *v.* Maryland, Leisy *v.* Hardin, *In re* Rahrer, and Bowman *v.* Railroad.) ***That cigarettes are a recognized commercial commodity must be conceded***, and it

follows that, in so far as the law in question amounts to a regulation of commerce, it is unconstitutional and void."

Four able and distinguished Circuit Court Judges of the United States and two of the State courts of highest appellate jurisdiction have held cigarettes to be "legitimate" articles of commerce. On the other hand, unsustained by any precedent, and without any testimony as to the character of cigarettes, the Supreme Court of Tennessee stands solitary and alone.

What is a cigarette anyway? The Encyclopædia Brittannica, Vol. 5, page 76, describes it as follows:

> "Cigarettes are small cigars, sometimes consisting of fine-cut tobacco wrapped up in thin paper or inserted in straw tubes."

Congress, in the Act of July 24th, 1897, gives the following definition:

> "That all rolls of tobacco, or any substitute therefor, wrapped with tobacco, shall be classed as cigars; and all rolls of tobacco, or any substitute therefor, wrapped in paper or any substance other than tobacco shall be classed as cigarettes."

Webster defines a cigarette to be:

> "A little fine tobacco rolled in paper for smoking."

That is all that a cigarette is, and it is this combination of tobacco and paper that the Supreme Court of Tennessee has declared is not an article of commerce at all. So far as tobacco is concerned, it has been judicially considered, and the New York Court of Appeals,

speaking of it in the form of cigars, says (*In re* Jacob, 98 N. Y., 98):

> "We must take judicial notice of the nature and qualities of tobacco. It has been in general use among civilized men for more than two centuries. It is used in some form by a majority of the men in this State, by the good and the bad, learned and unlearned, the rich and the poor. Its manufacture into cigars is permitted without any hindrance, except for revenue purposes, in all civilized lands. It has never been said, so far as we can learn, and it was not affirmed, even on the argument before us, that its preparation and manufacture into cigars were dangerous to the public health. We are not aware, and are not able to learn, that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. * * Mr. Secretary McCulloch, in his late annual report to Congress, in which he recommends the removal of the internal tax from tobacco that it might thus be placed upon a footing with other agricultural products, says: 'An article which is so generally used and which adds so much to the comforts of the large numbers of our population who earn their living by manual labor, cannot properly be considered a luxury.'"

It is this article that is denounced as unworthy of commercial recognition. It is not this article adulterated, for there is no evidence that the package sold by plaintiff in error contained the slightest adulterant, and the statute upheld is not an inspection law, but an absolute prohibition. If this law is to be upheld on the

ground that is taken by the Supreme Court of Tennessee, then a law prohibiting the importation or sale of tobacco in any form could be upheld; or the sale of coffee, if the members of the Legislature and Court should happen to be opposed to the use of coffee; or the sale of flesh of any kind, if the Legislature and Court happened to be composed of vegetarians.

It is to be noticed that the finding by the Supreme Court of Tennessee that cigarettes are not commercial articles, is not based upon testimony of their noxious qualities, nor on any other testimony; it is based on the fact that the Legislature has prohibited their sale, and the fact that the Court believes them to be noxious. Plaintiff in error by no means concedes that direct testimony of their noxious qualities would justify any court in declaring them to be not articles of commerce; indeed, he contends, as hereinbefore, and as has been frequently held by this Court and other courts, that the conceded noxious qualities of an article has nothing to do with its character as a commercial article. But he does desire to call attention to the fact that in this case the Court did not have before it any evidence whatever of the qualities of the cigarettes. The Court saw fit to take judicial notice of what it calls the well-known fact of the noxious qualities of cigarettes, when the consensus of opinion of those that know is that the cigarette, as sold upon the market, is not injurious in any other way than tobacco in other form.

The truth is that the prejudice against cigarettes in this country has, as its real reason, a feeling such as is expressed in "The Reference Hand Book of Medical Science" (Albert H. Buck, 1889):

> "Cigarettes are, on the whole, the most injurious form of tobacco, *not*, however, *because they are at all harmful if smoked in moderation*, but because *they are particularly affected by the youth of this country.*"

That is to say, the writer condemns nicotine gluttons and disapproves of the use of tobacco by the young. And to tobacco might be added, as perhaps equally objectionable, tea or coffee.

Perhaps there is no higher authority than Prof. H. H. Wiley, Chief Chemist of the United States Department of Agriculture, and he defines the cigarette that is to be found on the market to be 1.0926 grams of tobacco enveloped in a wrapper which weighs .038 grams. That is, one pound of tobacco will furnish the fillers for about 416 cigarettes, and one pound of cigarette paper will serve to envelope 1200 cigarette fillers. The same authority declares that "the samples purchased in the open market were found to be entirely free from any trace of arsenic, or of opium, or of any of its active principles." To the same effect is Prof. Willis G. Tucker, Analysist to the New York State Board of Health; Dr. G. F. Payne, State Chemist of Georgia; Wm. Odling, Prof. of Chemistry, University of Oxford, England, and a great number of other recognized authorities in the scientific world. Indeed, plaintiff in error believes that he can safely hazard his case on the statement that cigarettes, as popularly sold on the market, have never been found by any capable chemist to contain any noxious substance other than is contained in all forms of tobacco. He presumes that the Supreme Court of Tennessee would say that the fact that the tobacco for cigarettes contain opium, and that the papers are whitened by arsenic, are

so well known as to justify the Court in taking judicial notice of them, for these are the things that some people believe; whereas, as a matter of fact, the entire absence of either of these substances is thoroughly well known to every chemist who has made examination, including those of highest official positions in the United States.

In brief recapitulation of what has been argued at perhaps too great length, plaintiff in error contends that if you admit that cigarettes are noxious, you would not destroy their quality as commercial articles; that evidence of their noxiousness would be irrelevant, for they are recognized as commercial articles by commercial usage, by Congress and by the decisions of the courts; that however harmful they may be, they do not harm in their transit nor in their being stored, but their harm can come only, as harm comes from liquor, by an injudicious or intemperate use; that the so-called fact which the Supreme Court of Tennessee says is so well known as not to require evidence, to wit, the superlatively noxious quality of cigarettes, is in truth not a fact at all, and that cigarettes constitute the least harmful form of tobacco.

Cigarettes, then, are articles recognized as articles of commerce, by the commercial world for an indefinite time, by the law of Congress since 1864, and by the decisions of the courts since they were first brought into court. The sale of these articles is prohibited by a statute which applies equally to the domestic product and to imports. The legislation, it may be admitted, is based on the belief of the Legislature that the use of the article by the citizens of the State is harmful either to the citizens themselves or to the State. Can such a law be upheld when it seeks to prohibit the sale of the imported

articles? Is the belief of the Legislature that the article is harmful, even when that belief is supported by the concurring opinion of the Supreme Court of the State, sufficient to make valid the law so far as it seeks to prohibit the sale of such imports?

This question of the validity of a State prohibitory statute, as applied to the sale of imports from another State, came very prominently and famously before this Court in 1846, in the "License Cases" (5 Howard, 504). These cases were so important and interesting that all of the Justices delivered opinions. The Justices delivering the opinions differed from each other in their views as to the respective rights of Congress and the States under the commerce clause of the Constitution; some of the Justices contending that so far as the determination of the question as to what should be an article of commerce within it, the State was supreme, even though Congress had affirmatively spoken, and Justice McLean, in the course of his opinion, set out that doctrine as follows:

> "If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited. When, in the appropriate exercise of these Federal and State powers, contingently and incidentally their lines of action may run into each other, if the State power be necessary to the preservation of the morals, the health, or the safety of the community, it must be maintained."

This view was earnestly combatted by Justice Catron in language that has perhaps not since been improved upon:

> "If this be the true construction of the constitutional provision, the paramount power of Con-

gress to regulate commerce is subject to a very material limitation; for it takes from Congress and leaves with the States the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the States determine, what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power must not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. * * * For these reasons, I think the case cannot depend on the reserve power in the State to regulate its own police."

The opinion of Judge Catron, however, was that the power of Congress to regulate commerce is not exclusive, and that until it has spoken, the States may speak as to what shall be the articles of commerce, just as they may speak with reference to purely local commercial regulations, such as harbor improvement, etc. It is with this opinion that a majority of the Court concurred, and it is upon this theory that in the "License Cases" the right of the State to prohibit or license, even when applied to sales of imports, was affirmed.

The first notable criticism that the "License Cases" received in the Supreme Court of the United States, and the first time their authority was recognized as tottering, was in 1888, when Bowman *v.* Railroad was decided (125 U. S., 465). The question presented in that case was the validity of an Iowa statute making it a misdemeanor for any common carrier to transport or convey from one point to another within the State of Iowa any intoxicating liquors without conforming to certain State regulations. Justice Matthews, delivering the opinion of the Court in that case, is as strong and earnest in combatting the theory that the silence of Congress means its intention to submit to the several States the decision of what shall and what shall not be articles of commerce, as Judge Catron, in the earlier case, in combating the theory that the right of Congress was subordinate to the rights of the several States:

> "It (the State) cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. The statute of Iowa, under consideration, falls within this

prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit its introduction into the State from foreign countries of all importations of intoxicating liquor produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States. Can it be supposed that by omitting any express declarations on the subject Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious; It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the

promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within the limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

We do not mean that Bowman *v.* Railroad was the first case decided after 1846 that was at all inconsistent with the "License Cases," for, as will be seen in the opinion in Bowman's case, there had been in the interim many cases decided by the Supreme Court of the United States that were, on principle, not in harmony with the "License Cases." But Bowman's case was the first in which a decided and striking dissent was entered to the theories announced in the "License Cases." It is true that Bowman's case differed from the "License Cases" in that a *sale* was under discussion in the "License Cases" and a *transportation* was the thing discussed in Bowman's case; but it was seen that the reasoning of Bowman's case would mean the absolute overturning of the doctrine held in the "License Cases." And so it was as soon as the Supreme Court reached the question.

In 1890 the case of Leisy *v.* Hardin (135 U. S., 100) was decided by this Court. A statute of Iowa forbade

the selling of intoxicating liquors by any one, and provided for the forfeiture of all liquor kept with intent to sell. Under this statute the Marshal of the City of Keokuk, Iowa, seized one hundred and twenty-two one-quarter barrels of beer, one hundred and seventy-one one-eighth barrels of beer and eleven sealed cases of beer, under a proceeding instituted in accordance with the statute of Iowa. The beer had been imported from Illinois by the Leisys with the purpose of selling the same within the State of Iowa. The question was whether the statute, intended only to prevent the sale within the State of an article believed by the State Legislature to be injurious, could be enforced in so far as it sought to prohibit the keeping for sale or selling of the imported article. The Court's Chief Justice, Fuller, delivering the opinion, declared the statute invalid. This opinion is so well known as to relieve plaintiff in error of the necessity of making quotations therefrom, but it is perhaps well to say that in this case this Court returned to the ancient doctrine first announced in Brown *v.* Maryland (12 Wheat., 419), that the right to sell an article imported is an inseparable incident to the right to import it:

> "The authority of Pierce *v.* New Hampshire, in so far as it rests on the view that the law of New Hampshire was valid, because Congress has made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to."
>
> "Under our decision in Bowman *v.* Chicago and N. W. R. Co., *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to

sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the oreign non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any article which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

The case of Leisy *v.* Hardin was decided in 1890, and from that time to this its authority has not been questioned, so far as plaintiff in error can ascertain, by any

Court. It has been referred to as controlling in innumerable cases in State Courts and United States Circuit and District Courts. It has been cited with approval in every case involving questions of interstate commerce decided by the Supreme Court of the United States since its decision. Congress promptly recognized its authority by the passage of the Wilson Bill (Act of Congress of August 8th, 1890, 26 Stat., 313), which provided that intoxicating liquors, upon their coming into a State, should be subject to the operation of the laws of such State enacted in the exercise of its police power. The case of Leisy *v.* Hardin has not been overruled nor modified by this Court, and since its decision the doctrines it enunciated have been considered as settled law. These doctrines have perhaps nowhere been more concisely stated than by Justice White in Vance *v.* Vandercook (170 U. S., 438), in what may be called, as he calls them, the "few elementary propositions which are so entirely concluded by the previous adjudications of this Court that they need only to be briefly recapitulated" ——— the "A B C's" of the law on the subject. While these propositions refer to liquor, they are applicable also to cigarettes, for, as is said by Circuit Judge Lurton, Sawrie *v.* Tennessee, *supra:*

> "If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the State be admitted, much more can be said, and was said, of the evils (of intoxicating liquors) sought to be guarded against by the Iowa prohibition statute."

These "elementary propositions" are as follows:

> "(*a*). Beyond dispute, the respective States have plenary power to regulate the sale of intoxicating

liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the law-making power of the States, provided, always, they do not transcend the limits of State authority by invading rights which are secured by the Constitution of the United States; and provided further, that the regulations, as adopted, do not operate a discrimination against the rights of residents or citizens of other States of the Union.

(*b*). Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a State law, which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States.

(*c*). It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary nothwithstanding—that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution until, by a sale in the original package, they have commingled with the general mass of property in the State."

Neither Plumley's case (155 U. S., 461) nor Schollenberger's case (171 U. S., 1), referred to in the opinion of

the Supreme Court of Tennessee, is out of harmony with the views announced in Leisy *v.* Hardin, *supra*, and re-announced in Vance *v.* Vandercook, *supra*. Plumley's case was where a State statute was sustained as being an inspection law. It was not a prohibition law at all, and the title of the statute was "An Act to Prevent Deception in the Manufacture and Sale of Imitation Butter." There is no discussion in that case of what is or is not an article of commerce, but the whole ground for the opinion of the Court is contained in the words of Justice Harlan, as follows:

> "If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the Statute of Massachusetts, to manufacture it in that State or to sell it there in such a manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different than that which is offered for sale. Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

One would not suppose that Schollenberger's case (171 U. S., 1) would have been cited as sustaining the opinion of the Supreme Court of Tennessee in the case at bar, but it is. That was a case that arose under a Pennsylvania statute intended to prevent the sale of oleomargarine within the State of Pennsylvania. There were shipped to Schollenberger, from the State of Rhode Island, unenclosed packages of oleomargarine, suitable for the retail trade. He sold one of these packages, and the question arose whether the prohibition statute was valid as applied to this sale.

The Supreme Court of the United States decided that it was not. The Court further decided that oleomargarine is an article of commerce, and, in justification of that holding, referred to the very circumstances that are relied on in this argument to justify the contention that cigarettes are articles of commerce, to wit: that it had been known and manufactured for a long time; that its manufacture had been regulated and taxed by Congressional enactment, and that it is recognized as a commercial article by the commercial usage of the world. It was argued in that case, in favor of the validity of the law, that adulteration of oleomargarine was very easy and the detection of the adulteration was so difficult as to make an inspection law impracticable, and that most, if not all, of the oleomargarine of commerce is adulterated. While this is not said by the Supreme Court of Tennessee, with reference to cigarettes, the Supreme Court of Tennessee must believe this of them, or must believe that paper and tobacco are much more horrible things than they are usually believed to be. But this liability to adulteration and impracticability of the detection of adulteration were not thought by the Supreme Court of the United States, in Schollenberger's case,

sufficient to validate or justify a prohibition law. Two quotations from the opinion in Schollenberger's case will serve to show how far it is from an authority that sustains the decision of the Supreme Court of Tennessee in the case at bar:

> "In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. But, in carrying out its purposes, the State cannot absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine. * * * The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated articles may possibly, in some cases, be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question."

"What are the rights of one engaged in interstate commerce in regard to the introduction of a lawful article of commerce into a State? Those rights have been declared by various decisions of this Court, some of them made at a very early date and coming down to the present time.

In the leading case of Gibbons *v.* Ogden (9 Wheat. 1, at page 193) it was said by Marshall, Chief Justice, that the commerce clause extends to every species of commercial intercourse among the several States, and that it does not stop at the external boundary of a State, and that this power to regulate included the power to prescribe the rule by which commerce is to be governed, and it was held that navigation was included within that power.

In Brown *v.* State of Maryland (12 Wheat., 419) it was stated that this power to regulate commerce could not be stopped at the external boundary of a State, but must enter its interior, and that if the power reached the interior of the State and might be there exercised, it must be capable of authorizing the sale of those articles which it introduces. It was said that 'sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce.'

Years after the decision of the last case, and after many other decisions had been made upon the general subject of the commerce clause, this

Court, in Bowman *v.* Chicago and Northwestern Railway Company (125 U. S., 465), held that the State could not, *for the purpose of protecting its people against the evils of intemperance*, pass an act which regulated commerce by forbidding any common carrier to bring intoxicating liquors into the State from another State or Territory, excepting on conditions mentioned in the act. Such act was held to be repugnant to the Constitution of the United States, as affecting interstate commerce in an essential and vital part. But whether the right to transport an article of commerce from one State to another included, by necessary implication, the right of the consignee to sell it in unbroken packages at the place where the transportation terminated was not decided. In Brown *v.* Maryland (*supra*) it was said that the right of transportation did include the right to sell, as to foreign commerce, and, in the course of his opinion, Chief Justice Marshall said that the conclusion would be the same in the case of commerce among the States; but, as it was not necessary to express any opinion upon the point, it was simply held, in the Bowman case, that the power to regulate or forbid the sale of a commodity, after it had been brought into a State, does not carry with it the right and power to prevent its introduction by transportation from another State.

The case of Leisy *v.* Hardin (135 U. S., 100) went a step further than the Bowman case, and held that the importer had the right to sell in a State into which he brought the article from another State in the original packages or kegs, unbroken and unopened, notwithstanding a statute

of the State prohibiting the sale of such articles except for the purposes therein named and under a license from the State. Such a statute was held to be unconstitutional, as repugnant to the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States. Mr. Chief Justice Fuller, in speaking for the Court, said: 'Under our decision in Bowman *v.* Chicago, etc., R. R. Co. (*supra*) they had the right to import this beer into that State, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of Congressional permission to do so, the State had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer.' The right of the State to prohibit the sale in the original package was denied, in the absence of any law of Congress upon the subject permitting the State to prohibit such sale. There is no such law of Congress relating to articles like oleomargarine. Such articles are, therefore, in like condition as were the liquors in the cases above cited.

Subsequent to the decision in the *Leisy case*, and on the 8th of August, 1890 (26 Stat., 313), Congress passed an act commonly known as the Wilson act, which provided that, upon the arrival in any State or Territory of the intoxicating liquors transported therein, they should be subject to the operation and effect of the laws of the State or Territory enacted in the exercise of its

police power, to the same extent and in the same manner as though such liquors had been produced in such State or Territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress (*in re* Rahrer, Petitioner, 140 U. S., 545). In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one State to another *continues until a sale in the original package* in which the article was introduced into the State.

The case of Emert *v.* Missouri (156 U. S., 296) involved the validity of a statute of Missouri providing that peddlers of goods, going from place to place within the State to sell them, should take out and pay for licenses. The statute was held not to violate the commerce clause of the Constitution of the United States, because it made no discrimination between residents or products of the State and those of other States. The conviction of the plaintiff in error for a violation of the statute was upheld, although he was an agent of a corporation which manufactured the property in another State and sent it to him to sell as its agent. It was held to be within the police power of the State to regulate the occupation of *itinerant peddlers*, and to compel them to obtain licenses to practice their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall, in Brown *v.* Maryland (*supra*), was quoted, that "the right of sale may very well be annexed to importation without an-

> nexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way" (page 313). It was the privilege of selling in a peculiar way, *as a peddler*, which was licensed in the Emert case, and such a person, it was therein decided, could properly be made to pay a license for selling in that way an article manufactured in another State and sent into Missouri, as well as for selling, in the same way, articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.
>
> The Emert case does not overrule or affect the cases above cited as to the right to sell."

Collins *v.* New Hampshire is another case cited in the opinion of the Supreme Court of Tennessee as if it sustained conclusions arrived at by that Court in that opinion. Collins *v.* New Hampshire (171 U. S., 30,) was decided by the Supreme Court of the United States, Justice Peckham delivering the opinion of the Court, on the same day that Schollenberger's case was decided, May 23, 1898. It involved the validity, as applied to imports from another State, of a statute of New Hampshire requiring oleomargarine to be of a pink color and forbidding the sale of oleomargarine not so colored. The Court delivered a short opinion, and the gist of it is contained in the following paragraph:

> "The plaintiff in error claims that the statute under which he was indicted and convicted is void, because in contravention of the Constitution of the United States, which gives power to Congress 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.' We think this case comes within the

> principle of the cases just decided regarding the statute of the Commonwealth of Pennsylvania prohibiting the introduction of oleomargarine into the Commonwealth. This statute is, in its practical effect, prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended. The act is a mere evasion of the direct prohibition contained in the Pennsylvania statute, and yet, if enforced, the result, within the State, would be quite as positive in the total suppression of the article, as is the case with the Pennsylvania act."

Plaintiff in error believes that further argument than is contained in the quotations from the very recent opinions of this Court is unnecessary to establish the proposition, so well and so definitely announced in Leisy *v.* Hardin, as it had first been announced in the first great case on the subject (Gibbons *v.* Ogden, 1 Wheat., 1): "This power to regulate—that is, to prescribe the rule by which commerce is to governed, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Plaintiff in error believes that it is too well settled to be now disturbed, that the silence of Congress with reference to any article is equivalent to a declaration by Congress than commerce in that article shall be free, and he believes that no State, simply because its Legislature believes the use of an article by its citizens to be harmful, can so legislate as to prevent the importation of such article and its sale as an import.

The next question in the case is whether the package of cigarettes sold by plaintiff in error is an import, and so is entitled to immunity from prohibitory State legislation. The Supreme Court of Tennessee expresses this question as follows: "Was the sale shown to have been made in this case a sale of an *original package* in the true commercial sense?"

Plaintiff in error desires to make to this Court three distinct contentions with reference to this branch of the case:

(*a*). That he had a right to sell this package of cigarettes as an import, because it was the original package of importation, the only package delivered by the shipper to the carrier, and the only package delivered by the carrier to the plaintiff in error, the consignee;

(*b*). That even if the package sold by plaintiff in error had been enclosed with other packages of like kind for convenience of shipment, he would have had the right to break the enclosure and sell the package separately, because the package sold by him was a statutory original package, made such by the enactments of Congress.

(c). That even if the package received by him had not been made by Act of Congress a statutory original package, and even if it were not an original package of importation, it was still an indentifiable import, and in the hands of the first importer, before it had been so mixed with the property of the State as to lose its identity as an import, and as such could be sold by the first importer free from the interference of any State prohibitory law.

(A). There may be two grounds upon which the Supreme Court of Tennessee based its conclusion that the sale in this case was not of an original package in the true commercial sense. The two grounds are close to each other: one of them that the package was so small as to be evidently intended for the consumer rather than for the dealer, and the other, that the method of shipment adopted was such as to show that it would not have been adopted but for a desire on the part of the shipper to claim the immunity given to original packages under the commerce clause of the Federal Constitution. Plaintiff in error respectfully, but very earnestly, contends that neither of these grounds has anything whatever to do with the case.

The original package of transportation has perhaps not been better defined than by the Supreme Court of Iowa, in McGregor *v.* Cone (73 N. W. Rep., 1041; 39 L. R. A., 484). Plaintiff in error, in citing the case of McGregor *v.* Cone does not intend to say that he believes that the case was decided right. Indeed, he confidently insists that the case was decided wrong, as will be hereinafter more fully argued, but its definition of an original package seems to him clear. It is as follows:

> "The original package was and is the package as it existed at the time of its importation from one State into the other. * * The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form, or broken and transformed, it is a subject of interstate commerce."

The only possible criticism that can be made of that definition is that it emphasizes the non-resident shipper, whom it calls the importer, and does not emphasize the the resident consignee, who might, perhaps more properly, be also called the importer. It is the resident consignee whose act is questioned, and it is the package that he orders and receives from without the State that he has the right to sell. Of course, ordinarily, a delivery to the carrier, if it be a common carrier, is a delivery to the consignee and so the criticism becomes, generally speaking, unimportant. In this case, however, it is important, for the Supreme Court of Tennessee holds that the agent of the carrier, in gathering up the packages from the warehouse of the American Tobacco Company, and in putting these packages into a basket, which basket the carrier already had, was acting as *agent for the Tobacco Company*. If this be true, and if the carrier is to be thus considered the agent of the shipper, the American Tobacco Company, then the delivery to the plaintiff in error was not made until the agent of the carrier delivered these packages to plaintiff in error in Monroe County, Tennessee. Having then ordered these packages, with no basket whatever, and having received these packages, with no basket whatever, so far as the plaintiff in error is concerned, and he is the one indicted, each package is an original package, whatever method of shipment the American Tobacco Company may have adopted.

It seems to plaintiff in error that the mere fact, if it is a fact, that the American Tobacco Company had not usually adopted this method of shipment, and probably would not have adopted it but for the passage of this prohibitory statute, can have absolutely nothing to do

with the matter. Whether a package is or is not an original package of importation cannot depend upon the motive that induced the form of the package. As said by Justice Harlan, in his dissenting opinion in Bowman's case: "In this view (that is, the view of the Court) anyone—even a citizen of Iowa—desiring to obtain intoxicating liquors in that State need only to arrange to have them delivered from some point in another State, in packages of varying sizes as may suit customers."

The Supreme Court of Tennessee declares its opinion that this method of shipment was adopted in order to "evade" the prohibition statute of Tennessee, and the word evade has about it a sinister suggestion. Even conceding that the purpose that induced this method of shipment was a purpose to make it impossible for the State prohibitory statute to apply, plaintiff in error does not believe that any criticism of sinister design is justified. The Constitution of the United States, as construed by the highest Court of the United States, guarantees to plaintiff in error the right to import articles from another State and sell them. Under the technical construction that has been adopted by some courts, in order to have this Constitutional right, plaintiff in error was under the necessity, or at least believed he would be safer in so doing, of offering for sale only the identical package received by him. He induced the manufacturer, who had a factory in North Carolina, to agree to deliver him separate, unenclosed packages, such as would suit his custom. In accordance with that agreement these separate, unenclosed packages were delivered to him. The method of shipment was adopted, not to *evade* a law, but in order to get rid of techinicalities that would, perhaps, under a more convenient method

of shipment, have stood in the way of plaintiff in error in his effort to invoke a right guaranteed to him by the Constitution of the United States. It does not seem that one favoring the validity of the law as applied to the sale of an article which is unquestionably an import would speak of an "evasion," when the only way that the law can be upheld, if upheld at all, is by invoking a palpable and artificial technicality, to wit, that although the article in question is certainly an import in fact, it is not legally such, because the express company, instead of putting the import loose in its car, used a basket!

The size of the package, and the fact that it was suitable for retail trade, cannot make it not an "original package in the true commercial sense." The package was the exact package declared an original package in the true commercial sense in McGregor's case (*supra*), Minors' case (*supra*), Sawrie's case (*supra*), and every other cigarette case that has been decided. As recognized by Justice Harlan, when Bowman's case was decided, the party purchasing imports may purchase them "in packages of varying sizes, *as may suit customers*," and as said by Justice Gray, in his dissenting opinion in Leisy *v.* Hardin (*supra*) (on page 159):

> "If the statutes of a State restricting or prohibiting the sale of intoxicating liquors within its territory are held to be inoperative and void as applied to liquors sent or brought from another State, and sold by the importer in what is called 'original packages,' the consequence must be that an inhabitant of any State may, under pretext of interstate commerce, and without license or supervision of any public authority, carry or send into and sell in any and all of the other States of the

> Union intoxicating liquids of whatever description, *in cases or kegs, or even in single bottles or flasks*, despite any legislation of those States on the subject, and although his own State should be the only one which had enacted similar laws."

The Circuit Court of the United States, in the 8th Circuit, in Bein's case (42 Fed. Rep., 545), Circuit Judge Caldwell delivering the opinion, puts the question of the small package very well and clearly.

> "It is not perceived why, in the absence of legislation by Congress to the contrary, the importer may not determine for himself the form and size of the package he puts up for export. The idea that small packages of liquor cannot be treated as original packages because they are small, springs from the conviction back of it that liquor in any form, or in any sized packages, is not a legitimate subject of commerce. That question is put at rest by the decision of the Supreme Court of the United States until Congress shall act. *As long as packages of liquor, in any form or size, may lawfully be sold by the importer, or his agent, in a prohibition State, the size of the package is not of much consequence.*"

A citation of other authorities is unnecessary when the United States Supreme Court itself, in the very recent case of Schollenberger *v.* Pennsylvania, already cited, has disposed of the question. In that case the original package of oleomargarine was a package of ten pounds, a package suitable for the consumer and such as is ordinarily sold by a retail dealer to a consumer. This Court said, with reference to the distinction at-

tempted to be drawn between a sale at wholesale and one at retail:

> "We are not aware of any such distinction as is attempted to be drawn by the Court below in these cases, between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a ten-pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. * * *. *The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not.* His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages."

The authority in Schollenberger's case is irresistible as to this branch of the case at bar. A ten-pound box of oleomargarine is not materially larger, comparatively, than a ten-cigarette package of cigarettes. Each is an ordinary package for the consumer—neither one is such a package as a wholesaler would usually sell to a retailer by itself, and each is what ordinarily would be sold by a retailer to a consuming customer.

The methods and means used by the Express Company in getting the packages of cigarettes from Durham, North Carolina, to Madisonville, Tennessee, cannot affect the question as to whether these packages were or were not original packages. The basket used by the Express Company was in its possession before it received these

packages at all. Presumably it was the property of the Express Company, since presumptive title as to personalty follows the possession. When the Express Company received from the shippers these packages of cigarettes to carry to Madisonville, Tennessee, it had to deposit them somewhere, either in its car, or box in its car, or basket, or in some way. It chose a basket, but it never delivered that basket to the consignee, and it never received it from the shipper. The basket was its own receptacle as thoroughly as the express car would have been. But this method of carriage adopted, not by himself nor by the shipper, is given as one of the grounds for the holding that the consignee is to be denied his unquestioned Constitutional right to sell an undoubted import!

(*B*). Plaintiff in error, though, contends that the package he sold in this case is an original package, and, as such, an import, and that it would have retained its character as an import even if it had been enclosed with other packages of like kind for convenience of shipment, and he had broken the enclosure and taken one of the packages out. He contends that Congress has a right to prescribe what shall be an original package of any commodity with reference to which it legislates, and that the original package thus prescribed is an original package for all purposes.

Congress has prescribed, under heavy penalties, what shall be an original package of cigarettes, and the package sold by plaintiff in error in this case was such a package:

> "And provided, further, that every manufacturer of cigarettes shall put up all the cigarettes

that he either manufactures or has made for him, and sells *or removes for consumption or use*, in packages or parcels containing ten, twenty, fifty or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use, under such regulations as the Commissioner of Internal Revenue shall prescribe." * * * (*Rev. Statutes, Sec. 3392, as amended. Gould & Tucker's Notes, page 690.*)

"Every manufacturer of tobacco or snuff shall, in addition to all other requirements of this title relating to tobacco, print on each package, or securely affix, by pasting, on each package containing tobacco or snuff, manufactured by or for him, a label, on which shall be printed the proprietor's or manufacturer's name, the number of the factory, the district and State in which it is situated, and these words:

'NOTICE.—The manufacturer of this tobacco has complied with all the requirements of law. Every person is cautioned, under the penalties of law, not to use this package for tobacco again.'" (*Rev. Statutes, Sec. 3364.*)

It may be said, and it has been contended, that these statutes are Internal Revenue Statutes, and have nothing to do with commerce, but it is vain to say that any Congressional enactment does not have the effect that its words give, however codified and wherever such statute may be placed.

Besides these Internal Revenue provisions, Congress has expressly recognized and treated this prescribed

statutory package as the original package of commerce. Under the law at that time cigarettes were treated as cigars (Sec. 3387, Rev. Statutes, last line), and by Section 3381 of the Revised Statutes Congress provided, as to manufacturers of different forms of tobacco:

> "He shall neither sell, nor offer for sale, any tobacco, snuff or cigars, except in *original* and full *packages*, as the law requires the same to be prepared and put up by the manufacturer for sale, or for removal for sale or consumption, and except such packages of tobacco, snuff and cigars as bear the manufacturer's label or caution notice, and his legal marks and brands, and genuine Internal Revenue stamps which have never before been used."

Again, in the Act of March 3, 1883, Rev. Stat., Sec. 3381 (Chap. 121), by which the tax on cigarettes was reduced from $1.50 per thousand to $0.50 per thousand and the tax on other forms of manufacture of tobacco also reduced, Congress, in arriving at the rebate to be allowed dealers, holders of commercial articles while they were in the channels of commerce, provided:

> "That on all original and unbroken factory packages of smoking and manufactured tobacco and snuff, cigars, cheroots and cigarettes held by manufacturers and dealers at the time such reduction shall go into effect, upon which the tax has been paid, there shall be allowed a drawback or rebate of the full amount of the reduction." (*Amendment to Rev. Stat., Sec. 3355.*)

Such, too, was the construction of the law of the Commissioner of Internal Revenue, when the question

was squarely submitted to him, as shown by letter which is printed in the opinion of the court in the McGregor *v.* Cone, *supra:*

"WASHINGTON, D. C., April 6, 1893.

AMERICAN TOBACCO COMPANY,
No. 45 Broadway, New York, N. Y.

Gentlemen:

In reply to your inquiry of April 3d, submitting sample package of cigarettes bearing thereon the Internal Revenue stamp and the printed marks and caution label, and inquiring as to a necessity for re-enclosing in an additional covering of paper, wood or other material in placing the same upon the market, you are notified that said package, being a statutory quantity and properly stamped and canceled, and bearing thereon the caution label and number of the manufactory, the district, the State and the number of cigarettes contained therein, meets with the approval of this bureau, being a proper and original package, as contemplated by existing law and regulations.

Therefore, the repacking of said packages in additional covering of wood, paper, etc., is optional with the manufacturer and does not concern this bureau. This option is permissible under existing regulations, Series 7, No. 8 Revised, page 46, and Internal Revenue Record, Vol. 32, page 365, dated November 22, 1886.

Respectfully yours,

(Signed) JOHN W. MASON,
Commissioner."

This contention has been directly sustained in West Virginia, and besides the case in which it has been directly sustained, *dicta* have been in favor of it in various opinions. In State *v.* Goetze, *supra*, decided by the Supreme Court of West Virginia, the cigarettes were in packages similar to the package sold by plaintiff in error in this case, but these packages had been placed in a wooden box for shipment, and the Court held them to be nevertheless original packages, because so prescribed by Act of Congress. We quote the second paragraph of syllabus prepared by the Court:

> "Where cigarettes are manufactured in a sister State, and placed in paper boxes for convenience of transportation and sale, and such boxes are provided with a proper label, giving the name of the cigarette, the caution notice, the number of the factory, the number of the Revenue District, the name of the State in which they are manufactured, and the proper Internal Revenue stamp, duly cancelled, is pasted across the end of such package so as to seal the same in accordance with the requirements of the Act of Congress and sale of cigarettes, *such paper box must be regarded as an original package: and its character will not be changed by its being placed, with other boxes of the same kind, in a wooden box for shipment.*"

In the very recent case of Guckenheimer *v.* Sellers (81 Fed. Rep., 997) Circuit Judge Simonton, a very eminent and able Federal Judge, after discussing the immunity of the original package from the operation of the law under consideration, says the following, which, while it is *dicta*, is, considering the character of the Judge,

strongly in favor of the contention of plaintiff in error now being urged:

> "The original package only being protected under the law of interstate commerce, the question, what is an original package? is of grave importance. In arriving at a conclusion on this question, no aid is given from Acts of Congress *as is afforded in ascertaining what is an original package in the matter of cigarettes*, another article of interstate commerce which frequently clashes with police regulations. *Congress, in Sections 3381 and 3392 of Revised Statutes, has prescribed what shall be an original package of cigarettes.*"

The only case directly against this contention, and that discusses the point attempted to be made, to-wit: that this package is an original package because Congress says it is, is McGregor *v.* Cone, *supra*, decided by the Supreme Court of Iowa. And in that case the Court seemed to have fallen into the error of believing that the importer rested his case on the ruling of the Commissioner of Internal Revenue. Whatever might have been done in that case, the plaintiff in error in this case relies on a ruling of the Commissioner of Internal Revenue only as an incident, but he puts his faith in the statutes that Congress has passed, and, having sold cigarettes that complied with these statutes, he contends that he will be protected.

This contention is not at all in variance with the views of this Court expressed in Plumley's case, *supra*. In that case there was no question as to what was an original package—it was admitted that the package sold was an original package in the strictest sense. The only way in which the effect of Congressional legislation

came to be considered was in order to answer the contention of Plumley that Congressional legislation in relation to the inspection of oleomargarine had the effect of superseding any possible State legislation on the subject. The Court said that the contention was not sound—that Congress had in its enactment of the oleomargarine law expressly re-enacted Section 3243 Revised Statutes, already referred to in this brief, which provided that no payment of tax provided for by the internal revenue law should exempt one from the fines or penalties incurred by carrying on a business in a State in which the business was prohibited; that therefore the carrying on the business in accordance with the Act of Congress only exempts one from punishment by the general government, and does not exempt him from the effect of "any regulations which a State might lawfully prescribe in reference to that article."

With this holding, plaintiff in error has no quarrel. He admits that an inspection law, if it could be upheld at all, could be upheld notwithstanding the fact that the manufacturer had complied with the laws of Congress regulating the labeling and packing of the article. But the question here is not on an inspection law. It is not at all the question of Plumley's case. It is an attempt to enforce a law, certainly invalid as applied to sales in original packages, on the contention that this is not an original package at all. Plaintiff in error says, not that the law is invalid because Congress has already made regulations, but that so far as this package is concerned, it is entitled to all the rights of an original package, whatever they may be, because *Congress has declared it an original package*. This without adverting to the fact that the oleomargarine statute does not contemplate

transportation, while the cigarette statute has the significant words "*removes for consumption or use.*"

(*C*). Without losing sight of this contention that he will be protected in his sale because he sold a *statutory* original package, plaintiff in error desires to urge his contention that it is its *identifiability* as an import, and the fact that it is still in the channels of commerce, that gives to an import its immunity from State legislation that attempts to regulate or prohibit its sale.

Since the case of Brown *v.* Maryland (12 Wheat., 419) the phrase "original package" has been much used and given a most weighty significance. That phrase was born in the following paragraph of the opinion of Chief Justice Marshall, in Brown *v.* Maryland:

> "The Constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. *Till they do arise it might be premature to state any rule as being universal in its application.* It is sufficient for the present to say, generally, that *when the importer has so acted upon the thing imported that it has become incorporated and mixed up with*

> *the mass of property in the country*, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

As will be observed, while the phrase "original package" has been taken as furnishing a universal rule for distinguishing between goods imported and those which have lost their quality as imports, the great jurist who originated the phrase explicitly refused to attempt to lay down any universal rule. What suggests the original package as being the import is that, in most articles, the breaking of that package destroys the distinctive character of the article and makes it so it is not, at least, *self-identifiable* as an import. When the barrel of flour, for instance, is opened, and the grocer deals it out in smaller quantities, it has become mingled with the rest of the property in the State, and the flour does not longer identify itself as coming from another State. When liquor is drawn from an imported barrel, and put in bottles, it ceases to be self-identifying as an import and becomes like the other property of the State. With cigarettes this is not so, at least as long as the package containing them is sealed with a revenue stamp, whose cancellation shows that the package is from without the State, and that the stamp and package are still intact. The stamp and package must, under the law, show the character of the cigarette as an import, for the law of the United States (Rev. Statute, Secs. 3381 and 3392) requires peremptorily that the manufacturer must

put on the package his cancellation of the revenue stamps, which cancellation and package shall show the place of manufacture and packing. As long as the package is in this shape it cannot be said that the "importer has so acted on the thing imported that it has become incorporated and mixed up with the mass of the property in the country."

This view, more or less consciously held, has given rise, in certain decisions, to the use of the phrase "sealed package" as the test words to distinguish the import from the property that has become mingled with the mass of property of the State. Thus, the Court, in *ex parte* Jervey (66 Fed., 957), a case decided after the Wilson bill, passed in 1890, had subjected liquors to the police powers of the several States, began a discussion of the effect of the Wilson bill as follows:

> "The right of the States under the police power to regulate, restrain, or forbid the use, sale and keeping of intoxicating liquors within their own boundaries had been fully established by a long line of authorities (Boston Beer Co. *v.* Massachusetts, 97 U. S., 25; Foster *v.* Kansas, 112 U. S., 201; Mulger *v.* Kansas, 123 U. S., 659; Crowly *v.* Christensen, 137 U. S., 91). But the decision of the same Court had declared that sealed packages were not within the police power. Instances were of constant occurrence in which importers would carry into a State whose laws forbade the sale of intoxicating liquors *sealed packages of convenient size*, which were sold in that condition, protected under these decisions. Thus the laws of the State were evaded and set at naught, and the humane desire of the legislation entirely de-

> feated. Every effort to destroy this evil failed, and finally, in Leisy *v.* Hardin, 135 U. S., 100, the Supreme Court declared the law *granting immunity to the sealed package*."

This Court, while it has frequently made use of the phrase "original package," has nevertheless intimated that something other must be done to clearly identified and self-identifiable imports besides breaking the package in which shipped before they can be said to have become commingled and mixed with the mass of property in the State. In Leisy *v.* Hardin, *supra*, this Court uses the following language, which, although heretofore quoted in another connection, we feel at liberty to quote again:

> "Under the decision in Bowman *v.* Railroad, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the *right to sell it, by which act alone it would become mingled in the common mass of property within the State*."

And again, in the very recent case of Vance *v.* Vandercook, *supra*, Justice White, speaking for the Court, says:

> "* * * that the goods received by interstate commerce remained under the shelter of the interstate commerce clause of the Constitution *until by a sale* in the original package *they have been commingled with the general mass of property in the State*."

Then, after the delivery of the opinion in Leisy *v.* Hardin, but before the even more explicit statement in Vance *v.* Vandercook, Circuit Judge Goff, in Minor's

case, *supra*, a case involving the rights of the importer of the very articles involved in this case, says:

> "The right to purchase in one State carries with it the right to sell the article so purchased in another State, regardless of the State law, and independent of local interests and jealousies. Were this not so, the commerce between the States could be, and in many instances would be, entirely destroyed. *It is only by the sale of the imported article that it becomes mingled with the other property within the State.*"

Plaintiff in error contends very earnestly for a substantial and broad, instead of a narrow and technical, construction and enforcement of his Constitutional right. It is possible, under the conditions of trade, for cigarettes to be imported in the same package as is sold to a consumer, and without any enclosure about the package. But in some commodities this is not so. If the framers of the Constitution meant, by committing the regulation of interstate commerce to Congress, what Brown *v.* Maryland, Bowman *v.* Railroad, Leisy *v.* Hardin, and the other great cases have said they did, then they meant to confer a real and substantial privilege upon the citizen, and to commit a real and substantial power to the general Government. This privilege to the citizen is to buy an article from one State and sell it in another, free from the prejudices and local interests and jealousies of the latter State. If the State cannot prohibit, nor embarrass by taxation, the sale of an imported article, it ought not to be permitted to embarrass, destroy or prohibit commerce in it by necessitating unusual, expensive and sometimes impossible methods of shipment. As to its own internal affairs, let the State be supreme,

but as to commerce the General Government should be jealous and exclusive in its supremacy. If it is to be so, the importer, whether from a foreign land or another State, must be permitted to sell his import absolutely free from local jealousies, or prejudices, or interests, and the State must not be permitted to prevent the importation and sale, nor to *inconvenience or embarrass the importer*. The thing imported should be permitted to be sold, even if the enclosure put about it for convenience of shipment is removed, and this permission should continue until by a sale the article has been commingled with other property of the State, or until by a breaking of the *original package of manufacture*, or otherwise, the article has lost its identity as an import, and has been so acted upon "that it has been incorporated and mixed up with the mass of the property in the country." Thus held, the adjudications of this Court on this interesting question become logical, reasonable and purposeful. Thus held, the words of Justice Bradley in Stockton *v.* Railroad (32 Fed. Rep., 9) become true, in form and substance.

> "We think that the power of Congress is supreme over the whole subject of interstate commerce, *uninterrupted and unembarrassed by State lines or State laws*. On this matter the country is one, and the work to be accomplished is national; and State jealousies, State prejudices and State interests do not require to be consulted. *In matters of foreign and interstate commerce there are no States.*"

W. W. FULLER.
J. PARKER.
Attorneys for Plaintiff in Error.

No. 25.
Petition for Rehearing.
25

IN THE

Supreme Court of the United States.

FROM THE SUPREME COURT OF TENNESSEE.

WILLIAM B. AUSTIN

v.

STATE OF TENNESSEE.

Petition for Rehearing and Certificate of Counsel.

JOHN G. JOHNSON,
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IN THE

Supreme Court of the United States.

No. 25.—October Term, 1900.

WILLIAM B. AUSTIN,
Plaintiff in Error,

vs.

THE STATE OF TENNESSEE.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

Petition for Rehearing by Plaintiff in Error, William B. Austin, Above Named.

William B. Austin, the plaintiff in error in the above-entitled cause, respectfully presents his petition for rehearing, and submits the following reasons why his prayer should be granted:

1. The question involved in this case is a Constitutional question of extreme importance and interest. It involves the line of demarcation between the power of the Federal Government under the commerce clause of the United States Constitution and the police power of the State. This Court holds, without dissent, that cigarettes, the product whose sale is involved, are com-

mercial articles, and without dissent has overruled the Supreme Court of Tennessee in its ruling in this respect. By a divided Court, however, it is held that because of the smallness of the package, and the imputed purpose of the shipper to avoid the effect of the prohibitory statute, the package sold in this case was not an "original package" of import, so as to be, under the commerce clause of the Federal Constitution, exempt from the operation of State Laws.

The principle involved in numerous decisions of this Court from Brown *v.* Maryland, to Schollenberger *v.* Pennsylvania, seems to your petitioner to be seriously affected by the present decision.

The learned Justices who heard the oral argument being equally divided on this last question, your petitioner has been unfortunate in that Mr. Justice White was unable, through indisposition, to be present thereat. Inasmuch as his opinion rests largely upon what are supposed to be the special facts of the case, the misfortune of your petitioner in this particular is especially great.

The printed brief of the plaintiff in error was prepared and signed before Mr. John G. Johnson, who was retained in the case, and the argument which he made orally does not therefore appear, and is not embodied, in the said printed brief.

The case involves matters not only important to your petitioner, but immensely important as well to the public and to commerce. The principles involved are such that the authoritative, definite and conclusive disposition of the same are matters of intense interest, such as justify your petitioner, he thinks, in asking that every possible aid in the submission of the same to this Court shall be

given (Briscoe *v.* Bank, 8 Peters, 118; City of New York *v.* Milan, 8 Peters, 120; Insurance Company *v.* New York, 119 U. S., 129; Phillips' Practice, p. 380).

2. This Court, in the opinion which has prevailed, has, through the failure of your petitioner to call its attention to the fact that cigarettes are commonly sold in the identical package in which the sale in the case at bar was made, not been informed as to the usual manner of such selling. It is true that the Internal Revenue laws permit the packing of cigarettes into packages of 20, 50 and 100, as well as into packages of 10, but the ordinary package of commerce is one of 10, and the records of the Internal Revenue office show that many more cigarettes are shipped and sold in packages of 10 than in all other sizes combined.

3. This Court, through the fault of petitioner, disregards the fact that different manufacturers have different methods of distribution of their goods, so that the phrases "the usual method of shipment" and "the *bona fide* shipments," contained in the majority opinion, will induce very singular and unlooked for results. It is a fact that some manufacturers of cigarettes ship only to wholesalers, and in large quantities; some ship only to wholesalers and large retailers, and in smaller quantities; some ship to small retailers as well, and in still smaller quantities; and some ship to all these and to consumers, and in the small internal revenue packages. Therefore, under existing conditions and the opinion of the majority of this Court, an importer might sell two exactly similar packages of cigarettes, and one sale might be unlawful and the other lawful, because he had received the first from A, whose usual package of shipment was larger than this, and the second from B, whose usual package of shipment was not larger.

4. Petitioner respectfully submits that, perhaps through his own dereliction in the presentation of his case, great future embarrassment will result to the Court and to commerce from this decision, taking into consideration the previous opinions of this Court. Heretofore it has been uniformly held that the intent even of a State Legislature was not to be considered in enforcing and construing the grants of, or limitations on, powers contained in the Federal Constitution (Minnesota *v.* Barber, 136 U. S., 313; Mugler *v.* Kansas, 123 U. S., 623; Soon Hing *v.* Crowley, 103 U. S., 703). In this case, however, the intent even of the shipper is permitted to be controlling in determining petitioner's guilt, for petitioner assumes that the smallness of the package was considered and discussed by the Court only because it bore on and was evidence of the purpose of the shipper to avoid the prohibitory statute—the size of the package, *per se*, could not be material, for Congress, of course, has it powers, and citizens their rights, without reference to the size or value of the matter involved. It is evident, of course, that the shipper in this case supposed that the consignee, your petitioner, would sell the package of cigarettes shipped to him, and sell it nothwithstanding the State prohibitory statute. But this would have been just as certainly true, whatever had been the size of the package, and however the method of shipment had conformed to that usual with the shipper. This was unquestionably the expectation of the shipper in Leisy *v.* Hardin, Schollenberger's case, Bowman *v.* Railroad, and all the other cases in which this Court has, nevertheless, asserted the exemption of such original package from the operation of State laws, and that the sale is a necessary part of commerce. Therefore, if this expectation of the *shipper* is

to be considered an intent, and so to deprive the *consignee* of what, in its absence, would be his constitutional right, the constitutional right becomes of small practical value, and the power reserved to Congress becomes of small practical importance. If the intent of the shipper could be considered, it is not in this case an intent to "evade" a State statute, but rather to assert and rely on the protection of the Federal Constitution—the supreme law of the land. If intent was to be considered, have we not, in the Tennessee statute, evidence of an intent to evade - or rather to ignore—the Constitution of the United States?

5. Finally, petitioner contends that it is the *import*, in the hand of the original importer, that, under the previous decisions of this Court, is exempt from the operation of State laws, without reference to the form or value of such import; that the Constitution of the United States operates on *things* and *conditions*, and not on *persons* or *motives;* that the purposes or intent of the *shipper* or *common carrier* can be of no consequence in a case involving the guilt or innocence of the *consignee;* that the term "original package" properly involves no consideration of good or of bad faith, usual methods or unusual methods, or any other personal question, but that it is merely a suggested line of demarcation between an "import" properly so-called, and the "common mass of property of the State."

Your petitioner, therefore, respectfully prays that this case be restored to the docket and a reargument be ordered as to the questions upon which the Court was divided in opinion.

JOHN G. JOHNSON,
W. W. FULLER,
JUNIUS PARKER,
Attorneys for Petitioner,
Wm. B. Austin.

IN THE
SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1900.

WILLIAM B. AUSTIN,
Plaintiff in Error,

vs.

THE STATE OF TENNESSEE.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

The undersigned, members of the Bar of this Honorable Court, humbly conceived that it is proper that the writ of error in the above-entitled cause should be reheard by this Court, if this Court shall see fit so to order, and they, therefore, respectfully certify accordingly.

JOHN G. JOHNSON,
W. W. FULLER,
JUNIUS PARKER.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

W. B. AUSTIN

vs.

STATE OF TENNESSEE.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

STATEMENT OF CASE.

Austin prosecutes writ of error to reverse the judgment of the Supreme Court of Tennessee affirming the judgment of the Criminal Court convicting him and imposing a fine of $50.00 for selling cigarettes, in violation of the statute, passed in 1897, by the Legislature of said State, prohibiting the introduction and sale of cigarettes.

The statute is in these words, to-wit:

"Be it enacted by the General Assembly of the State of Tennesse: That it shall be a misdemeanor for any person, firm, or corporation, to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the

provisions of this Act shall be a misdemeanor, punishable by a fine of not less than fifty dollars.

"Be it further enacted, That the grand juries shall have inquisitorial power over offences committed under this Act."

Session Acts, 1897, Ch. 30.

The able and exhaustive opinion of the State Court, copied into the record, renders unnecessary any extended discussion of the questions involved.

The decision of the State Court is based upon two propositions, either of which will support its judgment. These propositions are:

1. That cigarettes, not being, on account of their noxious and hurtful character, *per se* legitimate articles of commerce, and not having been declared such, and commerce therein regulated, by Congress, it was the right and duty of the State, under its reserved police powers, to pass the statute in question, for the protection of the lives and health of its people, until Congress shall take appropriate action in the matter.

There is not implied in the State Court's decision any denial of the paramount power of Congress over the subject, when Congress shall choose to act.

2. That the sale of cigarettes involved in this case was not of an original package, but of parts of an original package that had been broken by the importer, and, therefore, not protected by the commercial clause of the Federal Constitution.

II.

ARGUMENT.

First: Cigarettes are not legitimate articles of commerce, and therefore their introduction into the State may be prohibited under the State's police power.

In the discussion of the first proposition it is important to note the precise terms and scope of the statute under consideration. It has been assumed that it is an absolute prohibition, and, therefore, a total obstruction of all interstate commerce in cigarettes within the State of Tennessee. Such is not the fact.

It does, unquestionably, prohibit the sale, the offering for sale, and the bringing into the State of cigarettes for sale, giving away, or other disposition for use. To remedy the evil at which the statute was levelled, it could not have done less. It does not, however, go beyond the "necessity" of the case. It does not prohibit, or embarrass, the transportation of cigarettes through or across the State, nor their introduction and even deposit in the State for re-shipment, or for any purpose other than use and consumption in the State.

This statute is enacted under the conceded power of the State to protect the lives, health and morals of its citizens, and has a "real and substantial relation to those objects." It does not obstruct or embarrass interstate commerce in cigarettes "beyond the necessity" of the case.

It is not a "palpable" and "needless" invasion of federal jurisdiction, such as this Court condemns,

although the statute may be enacted under color or pretense of exercise of police power.

Railroad vs. Husen, 95 U. S., 465.
Railroad vs. Ohio, 173 U. S., 300.

This statute makes no discrimination between citizens of Tennessee and citizens of other States. It is absolutely impartial.

It is not a statute that gives to Tennessee commercial advantages over other States. On the contrary, it involves a sacrifice of commerce on the part of Tennessee to secure protection for the lives, health and morals of its citizens. Such is the true character of this statute.

The State Court thus characterizes the evil at which this statute was leveled:

"Are cigarettes legitimate articles of commerce? We think they are not because wholly noxious and deleterious to health. Their use is always harmful; never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward impairment of physical health and mental vigor."

Tennessee is not alone in its unqualified condemnation of cigarettes. Other States have passed prohibitory statutes.

In *Sawrie vs. Tennessee, 82 Fed. Rep., 615*, Circuit Judge Lurton characterizes the use of cigarettes as "an evil of most pronounced character."

Recent examinations of candidates for military service disclosed the frightful extent to which the young men, eligible to army and navy, had been deteriorated and disabled by the use of

cigarettes. Can a State, in the absence of federal regulation of the subject, lawfully enact a statute, such as the one above quoted, to protect the lives, health and morals of its citizens against evil consequences of such "pronounced character" as it is declared the sale and use of cigarettes entail? "This Court has often declared that the most important function of government was to preserve the public health, morals and safety; that it could not divest itself to that power, nor by contract limit its exercise; and that even the constitutional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals or the safety of the community, as the one or the other may be involved in the execution of such contracts."

Bowman vs. Railroad, 125 U. S., 465. (31. L. Ed., 718.)
Stone vs. Miss., 101 U. S., 814.
Butchers' Union Co. vs. Crescent City Co., 111 U. S., 746.
N. O. Gas Co. vs. La. Light Co., 115 U. S., 650.
Mugler vs. Kansas, 123 U. S., 664.

Again, it is said that: "It is not only the right but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular or the manner of its exercise is not surrendered or restrained by the Constitution of the United States."

New York vs. Miln, 11 Pet., 139.

"In giving the commercial power to Congress the States did not part with that power of self preservation which must be inherent in every organized community. They may guard against the

introduction of anything which may corrupt the morals or endanger the health or lives of their citizens."

Passenger Cases, 7 Hum., 400.

"This Court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachments in the form or under the guise of State regulations established for the purpose and with the effect of destroying or impairing rights secured by the Constitution. *It has nevertheless, with marked distinctness and uniformity, recognized the necessity growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health and property which each State owes to her citizens.*"

Patterson vs. Kentucky, 97 U. S., 505.

"The true interest of the people of this country requires that both the National and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution.

State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But in endeavoring to vindicate one we should not allow our zeal to nullify or impair the other."

Mr. Justice Bradley in ex parte Siebold, 100 U. S., 393.

It was aptly said by Mr. Justice Harlan, in *Plumley vs. Mass., 155 U. S., 461*, that there is

not a suggestion or intimation in any of the cases that the commercial clause of the Federal Constitution "secured to any one the *privilege of commiting a wrong against society.*"

And by Mr. Justice Green, in *Passenger cases, 7 How, 457:* "This right of the States has its foundation in the sacred law of self defense which no power granted to Congress can restrain or annul."

This Court has frequently recognized, and its decisions evince the difficulty of ascertaining and declaring that line of demarkation between the legitimate police powers of the States and the power of Congress to regulate commerce, that will best promote and subserve the interests of society and good government. While some general principles of universal application have been enunciated, the practice has been to declare the rule applicable to each particular case as it arises, leaving the Court free to deal with new cases upon their own merits. It is well settled that a State statute, enacted in good faith for the protection of the lives, health and safety of the people, or even to promote public convenience, if reasonably adapted to that purpose, does not violate the commercial clause of the Federal Constitution, though it may to some extent affect interstate commerce, especially if it relates to a subject of commerce that Congress has not undertaken to regulate.

Railroad vs. Ohio, 173 U. S., 285.

In *Sherlock vs. Ailing*, 93 U. S., 99, 103, Mr. Justice Field thus states the doctrine: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health,

life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." Approved in

Kidd vs. Pearson, 128 U. S., 23.
Railroad vs. Alabama, 128 U. S., 101, and other cases.

Similar utterences may be found in numerous decisions of this Court.

The opinion of the State Court supports the proposition that cigarettes are not legitimate articles of commerce, with a convincing argument, which need not be repeated here.

It is conceded in the brief filed on behalf of the plaintiff in error, that the State may lawfully regulate, or perhaps *prohibit*, the introduction of certain articles, such as "high explosives, or malodorous guanos," and "putrid meats." For what reason may this be done? Clearly because the articles are not legitimate subjects of commerce. They are, indeed, subjects of commerce, but not legitimate subjects of commerce.

But it is said in behalf of the cigarette, that "it will not explode, it is not malodorous."

Is not the cigarette a far more serious menace to the lives, health and safety of our people than any "high explosive" or "malodorous guano?"

None of the cases deny the right to the State to exclude the introduction of impure or fraudulent articles, which are otherwise legitimate articles of commerce. This rule has been applied to oleomargerine, and perhaps some other legitimate articles of commerce. But cigarettes are declared "inherently bad, and bad only." They

admit of no beneficial use, and are universally deleterious to health and vigor.

Beneficial uses of ardent spirits, opium, arsenic, strychnine, and even of "high explosives," "malodous guanos," and "putrid meats," may be suggested. Who can suggest any beneficial use of cigarettes? Who can suggest any but a harmful use of them?

In the concurring opinion of Mr. Justice Field, in *Bowman vs. Railroad, supra*, it is said:

"There may be great difficulty in regulating the use and sale of intoxicating liquors, and I admit that whenever the use of an article cannot be regulated and controlled so as to insure the health and safety of society, it may be prohibited, and the article destroyed."

If, as is admitted in the decisions of this Court, "the police power of a State justifies the adoption of precautionary measures against social evils," and if, "under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace," and if a State may "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases," why should a State be denied the right to exclude from its borders cigarettes, or other product or commodity whose use by its people tends to produce paupers, lunatics, convicts, and persons likely to become a public charge?

Does the freedom of commerce demand that citizens of other States and foreign countries shall have the right to invade any State of this Union, and there do what is denied to the citizens of that State by its laws, to wit: sell for consumption an article calculated to harm its people?

The reason and principle that excludes any of the articles mentioned apply to exclude cigarettes *in toto.* They are all "bad, and bad only."

This Court entertains a very strong, if not conclusive, presumption in favor of the validity of a State statute, enacted in good faith, to protect the lives, health and safety of its citizens, and reasonably appropriate for that purpose.

Powell vs. Pa., 127 U. S., 678.
Mugler vs. Kansas, 123 U. S., 664.

As illustrative of the proposition that State statutes of this character are valid though they may affect interstate commerce, the following cases are instructive:

State statutes that stop absolutely the flow of interstate commerce fifty-two days (Sundays) in the year have been held valid.

Hennington vs. Ga., 163 U. S., 299. S. C., 90 Ga., 396.
Railroad vs. Va., 34 L. R. A., 105.

These statutes are sustained upon the ground that the health and vigor of the people are promoted by rest for one day in each week.

State statutes requiring examinations and licenses of railroad employes, though engaged in conducting interstate commerce, have been sustained as reasonable police regulations for the safety of the traveling public.

Smith vs. Ala., 124 U. S., 464.
Railroad vs. Ala., 128 U. S., 96.

Likewise a State statute has been sustained which requires railway trains, though engaged in interstate transportation, to stop at all stations within the State.

Gladson vs. Minn., 166 U. S., 427, which distinguishes *Railroad vs. Illinois, 163 U. S., 142,*

on the ground that the latter case required stoppages at stations not on the direct line of travel. So a State statute forbidding the heating of trains in a particular manner, and applying to trains running interstate, was held valid, as a reasonable regulation for the safety and comfort of the public.

Railroad vs. New York, 165 U. S., 628.

So a State statute requiring railroads engaged in interstate and other commerce, to stop three trains each way daily, Sundays excepted, has been sustained as a reasonable regulation for the public *convenience.*

Railroad vs. Ohio, 173 U. S., 285.

Likewise State statutes requiring separate coaches, in interstate travel as well as local, for white and colored persons.

Smith vs. State, 100 Tenn., 494.
Plessy vs. Ferguson, 163 U. S., 537.

These cases will suffice, but there are numerous other decisions of this Court to the same effect. The principle upon which all these decisions is predicated is best expressed in the closing sentence of Mr. Justice Harlan's dissenting opinion in *Bowman vs. Railroad, 125 U. S., 524:*

"The reserved power of the States to guard the health, morals and safety of their people is more vital to the existence of society than their power in respect of trade and commerce, having no possible connection with these subjects."

The lives, health and safety of the people are weighter matters than any mere consideration of traffic. Both the Federal and State governments should co-operate to promote the best and highest interests of society. If the Federal government has acted, its action is controlling, but if it has

failed to do so, what just reason exists to deny the States the power to protect their citizens until Congress shall act?

Congress may at its pleasure annul the State regulation and substitute its own. "And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

Pound vs. Turck, 95 U. S., 459.
Railroad vs. Ohio, 173 U. S., 293.

To the suggestion that the States may abuse the power to pass statutes of this character by excluding ligitimate articles of commerce to build up their own interests, it is sufficient to say that possible abuse of power is never a just argument against its existence. But as the action of Congress supersedes any action of the States, and as this Court determines the good faith of all legislative enactments in cases of this character, it is difficult to appreciate the danger that is supposed to attend its exercise.

Speaking of "imaginary cases" put in argument, this Court in *Railroad vs. Ohio, 173 U. S., 308*, said:

"Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise, in which local statutes are alleged not to be legitimate exercise of the police power of the State, but to in-

fringe upon National authority, it can be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

See also Bowman vs. Railroad, 125 U. S., 31 L. Ed., 718.

In *Bowman vs. Railroad, supra*, it is conceded that a more liberal rule in favor of the States exists in cases of interstate, than in cases of international commerce, the Court saying:

"The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide, by law, a regulation of commerce among the States, is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce shall be freely dealt with by the respective States."

Revenue statutes are not, do not purport to be, and are not intended to be, regulations of commerce.

An implication from such legislation should not be permitted to affect, much less destroy, the police power of the State in matters vital to the public safety and health.

As shown in the opinion of the State Court, the Federal revenue statutes make express provision against such result.

Nor is taxation of a subject any recognition of its commercial character in the sense that it is withdrawn from the State's police power. If so, then taxation of "high explosives," "malodorous guanos," "putrid meats," would deprive the States

of the power to protect the people against their introduction. The power to tax is the power to destroy. It is often exercised, especially in levying license taxes, to restrict and even to destroy commerce, and even the manufacture of an objectionable commodity.

The legislation of Congress that will deprive the States of the right to legislate upon a subject under their reserved police powers must, it seems, have direct reference to the subject of commerce, and be utterly inconsistent with such power in the States.

Railroad vs. Haber, 169 U. S., 613.

Hence it has been held that the federal statute authorizing steam railway companies "to carry upon and over its road, boats etc., all passengers, mails, freight, etc., on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for transportation of the same to the place of destination," is not conclusive.

Railroad vs. Haber, 169 U. S.
Railroad vs. Ohio, 173 U. S., 308.

No such recognition of commerce in cigarettes can be shown. Notwithstanding the above cited statute, this Court has repeatedly sustained State statutes vary materially affecting interstate transportation over railroads as proper exercise of police power. No just demand of interstate commerce requires the annulment of this Tennessee statute.

This case is distinguishable from that of *Leisy vs. Hardin*. Under the Iowa statute involved in the latter case, the State did not deny itself all

commerce in the article inhibited, but left the article, for some purposes, a legitimate article of commerce. It is left by that statute in the channels of commerce. In this case the article is inhibited altogether, not left in the channels of commerce for any purpose. It is declared to be not a legitimate article of commerce for any purpose whatever, but "bad, and bad only." The State denies itself the benefits of all commerce in the article. It is, therefore, not a statute to build up the commerce of the State at the expense of other States.

In *Leisy vs. Hardin* it is said that if proposed imports are "directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

The Tennessee statute forbids not only the sale, but the offer to sell, and the giving away of cigarettes, and forbids also the *bringing* of them into the State for any of these purposes.

The inhibition of this statute takes effect at the border of the State, and "before it (the State) obtains complete jurisdiction over them."

It may be said that cigarettes are not "directly dangerous," but they are certainly equally harmful, and less useful, than many articles that are directly dangerous.

The question, however, is one as to the necessity of protection of the people against the particular article, and not as to the form of the evil.

Moreover, what was accomplished by the *Leisy-Hardin* case can be effected more beneficially to the whole people by the application of the principles contended for by defendant in error in this case. In that case the State legislation, in reference to a matter confessedly needing regulation,

was set aside, and the people left without any regulation on the subject until Congress chose to act.

Under the principle here contended for, the power of Congress to regulate is not denied, and the action of Congress, when taken, is conceded to be supreme and controlling, but until Congress does act, the people retain such benefits and protection as State legislation affords.

Does not the latter rule best subserve the ends of good government—the highest object of both the State and the United States?

II.

The sale in question was not of an original package, but of a part of an original package that had been broken by the importer or by his agent, after its introduction into the State.

The argument contained in the opinion of the State Court is relied upon in support of this proposition. A few suggestions in reply to the brief of plaintiff in error will be added.

This language is found in the brief of plaintiff in error, to-wit:

"It is the resident consignee whose act is questioned, and it is the package that he orders and receives from without the State that he has the right to sell. Of course, ordinarily, a delivery to the carrier, if it be a common carrier, is a delivery to the consignee, and so the criticism becomes, generally speaking, unimportant. In this case, however, it is important, for the Supreme Court of Tennessee holds that the agent of the carrier, in gathering up the packages from the warehouse of

the American Tobacco Company, and in putting these packages into a basket, which basket the carrier already had, was acting as *agent for the Tobacco Company.* If this be true, and if the carrier is to be thus considered the agent of the shipper, the American Tobacco Company, then the delivery to the plaintiff in error was not made until the agent of the carrier delivered these packages to plaintiff in error in Monroe County. Tennessee. Having then ordered these packages, with no basket whatever, and having received these packages, with no basket whatever, so far as the plaintiff in error is concerned, and he is the one indicted, each package is an original package, whatever method of shipment the American Tobacco Company may have adopted."

In reply it is submitted:

1. That if, as held by the State Court, the carrier was agent of the shipper, and, as inferred from that fact by plaintiff in error, that delivery to him did not take place until the baskets were emptied on his counter in Monroe County, Tennessee, then the shipper was the importer, and the sale to defendant by the shipper was consummated in Tennessee, and plaintiff in error could not resell as importer either in broken or unbroken packages.

2. That if the carrier, as plaintiff in error suggests, is to be treated as his agent to accept delivery and carry the cigarettes into this State, then plaintiff in error was the importer, and must sell the goods, "in his character as importer" and in "the form in which it (they) were imported."

Brown vs. Maryland, 12 Wheat, 446.
License Cases, 5. How., 574-576.

It is the package, in the "form and shape" in

which it entered the State, whether carried into the State by the agent of the seller or the agent of the buyer, that is in question. The carrier was agent of one or the other, and his acts, in making up the packages for shipment, and in breaking them, are, in law, the acts of his principal. If this be not true, and the carrier has so acted upon the packages without authority of seller or buyer that they were not the same when they were delivered to him and by him to the plaintiff in error as when they crossed the State line, then he must be treated as the importer. Some one must be importer, and he alone can sell as importer, and he can sell as importer only the original package in the form and shape in which it entered the State. It can never be tolerated that the parties shall evade the State laws by procuring or permitting some third person to make and break the original package which enters the State, and thereby escape responsibility themselves. Either they or the third person must be made amenable to law. It is not necessarily the package that the consignee "orders and receives" that is the original package. It must also be the package transported in the "shape and form" that it entered the State.

No matter by whom broken, the breaking of the original package destroys the right to sell its contents as an import.

In the license cases, Ch. J. Taney, in summarizing the decision in *Brown vs. Md.*, and declaring the law on this subject of interstate commerce, says: "And the Court there held that an article authorized by law of Congress to be imported continued to be a part of the foreign commerce of the country *while it remained in the hands of the im-*

porter for sale in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article *in the form and shape in which it was imported*, so that no State, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; *but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State like any other property.* * * * * * Indeed, goods imported, while they remain in the hands of the importer *in the form and shape in which they were brought into the country*, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government. * * * * * * And while they are in the hands of the importer for sale *in the form and shape in which they were introduced*, and in which they were intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages and country for which they are destined, where they are expected to be used and consumed, and for the supply of which they were, in truth, imported." The authority of the license cases on this point has never been shaken.

In *Puryear vs. Mass., 5 Wall., 475-481*, will be

found Chief Justice Chase's views of what was decided in *Brown vs. Maryland.*

In the case of *Leisy vs. Hardin, 135 U. S., pp. 100-160,* Ch. J. Fuller states, as the result of the decision in *Brown vs. Maryland,* "that the point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with a mass of property in the country, which happens when the original package is no longer such in his hands."

See also, Bowman vs. R. R., 125 U. S., 524.
Waring vs. Mobile, 8 Wall, 110.

While the Court has not undertaken in any of these cases, or in others of which we are aware, to define an original package, its declarations seem to have been all to the effect that the package *in the form and shape* in which it is brought into the State is the original package of commerce which the importer is entitled to sell. This construction answers the purposes of commerce, and all the purposes of commerce, and at the same time does not trammel the necessary powers of the States.

Again, plaintiff in error contends that the adoption of an unusual method of shipment to evade State laws can have no force in the determination of this question.

It is said "the method of shipment was adopted, not to evade a law, but in order to get rid of technicalities."

What technicality stood in the way of plaintiff in error except a plain State statute? The contention here seems to be that the commercial clause of the Constitution shelters not only the ordinary,

direct and honest transaction of commerce—commerce carried forward by the usual methods—but any unusual and colorable device or form that may be invented by an importer to evade and defeat a State law, as a technicality.

The right of the States to protect their people by appropriate legislation is quite as important and sacred as the right of an importer to sell his import.

State laws have sometimes been declared mere colorable and fraudulent devices to evade the Constitution and have been set aside for the protection of importer's rights.

Will not the colorable and fraudulent devices of importers, invented to evade State laws and subvert the rights and powers of the States, be treated in like manner? Fraudulent and indirect schemes to evade State laws have never met with favor in this Court.

In *Mitchell vs. Leavenworth County, 1 Otto, 206*, a taxpayer sought to enjoin an assessment on the ground that his funds consisted of exempt United States notes.

The facts were that on the day of assessment Mitchell had only these exempt notes. It further appeared, however, that he ordinarily carried a large bank account, but shortly before assessment he drew it out in these notes to evade taxes. This Court refused relief, saying it would not "knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a Court of law." True, that was an appeal for the exercise of the extraordinary powers of this Court as a Court of equity. What power of this Court is more ex-

traordinary, or more reluctantly exercised, than the power invoked in this case, the power to declare a statute unconstitutional and void. Such power is never exercised unless the question necessarily arises upon the record.

No statute is ever declared unconstitutional unless it appear so beyond reasonable doubt. The burden is upon the party assailing the constitutionality of a statute to establish every requisite to the exercise of the jurisdiction by the Court.

But, as we have already seen, this cunning device by which the carrier is made to do the packing and unpacking for the parties, and thereby enable the seller to say that he did not pack the goods, and the buyer to say he did not unpack them, is unavailing.

No matter who brings the goods into the State, they must be sold, if at all, in the *shape* and *form* in which they entered.

A beneficial State law will not be stricken down, and the power denied the State to protect its citizens, upon any such fine-spun theories as is advanced by plaintiff in error in the following quotation from his brief, to-wit:

"The methods and means used by the Express Company in getting the packages of cigarettes from Durham, North Carolina, to Madisonville, Tennessee, cannot affect the question as to whether these packages were or were not original packages. The basket used by the Express Company was in its possession before it received these packages at all. Presumably it was the property of the Express Company, since presumptive title as to personalty follows the possession. When the Express Company received from the shippers these packages of cigarettes to carry to Madisonville, Ten-

nessee, it had to deposit them somewhere, either in its car, or box in its car, or basket, or in some way. It chose a basket, but it never delivered that basket to the consignee, and it never received it from the shipper. The basket was its own receptacle as thoroughly as the express car would have been."

In other words, it is not only possible, but easy of accomplishment, for the importer, whether seller or buyer, to shelter himself under the commerce clause of the Constitution, and evade all State police regulations by simply having the carrier or other third person to pack and unpack his goods.

It is a sufficient answer to the contention that the plaintiff in error sold an original package as declared by the revenue laws and department, and that such revenue package is likewise the original package of commerce, to say that these cigarettes were not introduced in the revenue packages, but in combinations of these packages into a larger one, and that the latter constitutes, in such case, the original package of commerce. It was one of the parts of an original package that was sold by plaintiff in error. The identity of the original package had been destroyed by breaking it. It was the basket in this case.

The case of *State vs. Goetze, 43 W. Va., 495*, held that an inclosed box containing small ten cigarette packages did not constitute the original package of commerce, but that each component small package was an original package and could be sold as such after breaking the box.

This case is clearly out of line with the great weight of authority. No other case goes so far. There are numerous cases to the contrary.

The suggestion, rather than insistence, that this Court has "intimated that something other must be done to clearly identified and self identifiable imports besides breaking the package in which shipped before they can be said to have become commingled and mixed with the mass of property in the State, is novel and without the support of reason or authority.

The language cited from *Leisey vs. Hardin* and other cases was not intended to decide any such proposition. The cases, from which the citations are taken, are cases in which there was no controversy as to the fact of original package.

Moreover, a fuller and more accurate statement of the rule will be found in other portions of the opinions, especially in *Leisey vs. Hardin.*

The proposition put forward in the brief of plaintiff in error, that the package he sold in this case is an original package, and, as such, an import, and that *it would have retained its character as an import even if it had been enclosed with other packages of like kind, for convenience of shipment, and he had broken the inclosure and taken one of the packages out,*" finds no support in the *decision* of any Court except that of West Va., in the *Goetze* case. There is an overwhelming weight of reason and authority to the contrary.

McGregor vs. Cone, 39 L. R. A., 484, citing the cases.

Nor is it necessary that the "box, barrel, crate or other receptacle" in which goods are imported, shall be fastened or inclosed to constitute it, and not the smaller packages constituting its contents, the original package of commerce.

South Dakota vs. Chapman, 10 L. R. A., 432.
Keith vs. Ala., 10 L. R. A., 430.

In conclusion:

"The judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health, and the morals of the people—unless such legislation *plainly* and *palpably* violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of National concern."

Plumley vs. Mass., 155 U. S., 461.

G. W. PICKLE,
Attorney-General for Tennessee.

Supreme Court of the United States.

No. 25.—October Term, 1900.

William B. Austin, Plaintiff in Error, vs. The State of Tennessee. } In error to the Supreme Court of the State of Tennessee.

[November 19, 1900.]

This was a writ of error to review the conviction of Austin for the sale of cigarettes in violation of an act of the General Assembly of Tennessee, (Chap. 30, Acts of 1897,) the material portion of which reads as follows:

"Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than fifty dollars."

Defendant was convicted in the Circuit Court of Monroe County; fined fifty dollars and committed until the fine should be paid; and upon appeal to the Supreme Court of Tennessee the judgment of the Circuit Court was affirmed. (101 Tenn. 563.)

Mr. Justice Brown delivered the opinion of the Court.

It is charged that the act in question, in its application to the facts of this case, is an infringement upon the exclusive power of Congress to regulate commerce between the States. This is the sole question presented for our determination.

We are not disposed to question the general principle that the States cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, (*Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78,) or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. (*The Passenger Cases*, 7 How. 283; *Welton* v. *Missouri*, 91 U. S. 275; *Henderson* v. *The Mayor*, 92 U. S. 259; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Guy* v. *Baltimore*, 100 U. S. 434; *Ward* v. *Maryland*, 12 Wall. 418; *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59.) In this connection we endorse fully what was said by this court in *Mugler* v. *Kansas* (123 U. S. 623, 661): "If, therefore, a statute purporting to have been enacted to

protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution."

The Supreme Court of Tennessee placed its decision of this case upon two grounds: First, that cigarettes were not legitimate articles of commerce; second, that the sale shown to have been made was not the sale of an original package in the true commercial sense.

1. We are not prepared to fully indorse the opinion of that court upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the States. Of this class of cases is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community. Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale, imposing a revenue tax upon each package of cigarettes put upon the market, and by making express regulations for their manufacture and sale, their exportation and importation. Cigarettes are but one of the numerous manufactures of tobacco, and we cannot take judicial notice of the fact that it is more noxious in this form than in any other. Whatever might be our individual views as to its deleterious tendencies, we cannot hold that any article which Congress recognizes in so many ways is not a legitimate article of commerce. The language of Chief Justice Taney in the *License Cases*, (5 How. 504,) with reference to intoxicating liquors is so pertinent to this case that it deserves to be here repeated:

"But spirits and distilled liquors are universally admitted to be subject of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may, therefore, admit or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction."

"But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part

of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The same ruling with regard to the power of the States to prohibit the sale of intoxicating liquors was made in *Bartemeyer* v. *Iowa*, (18 Wall. 129,) in which it was held the right to sell such liquors was not a privilege or immunity which, by the Fourteenth Amendment, the States were forbidden to abridge. And in the later case of *Beer Co.* v. *Massachusetts*, (97 U. S. 25,) it was held that a company chartered "for the purpose of manufacturing malt liquors in all their varieties" held its franchise subject to the police power of the State, and that, if the public safety or public morals required the discontinuance of such manufactures, the legislature might so provide, notwithstanding individuals and corporations might thereby suffer inconvenience. In *Mugler* v. *Kansas*, (123 U. S. 623,) and *Kidd* v. *Pearson*, (128 U. S. 1,) the principle of this case was extended so far as to hold that such laws might be enforced against persons who, at the time, happened to own property whose chief value consisted in its fitness for manufacturing intoxicating liquors, without compensating them for the diminution in value resulting from such prohibitory enactments; and in *Foster* v. *Kansas*, (112 U. S. 201,) it was regarded as the settled doctrine of this court that such laws, prohibiting the sale and manufacture of intoxicating liquors, were not repugnant to the Constitution of the United States.

How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this court. Nor is it necessary to the decision of this case. It was held, however, in *Powell* v. *Pennsylvania*, (127 U. S. 678,) that a statute of Pennsylvania prohibiting the manufacture or sale of oleomargarine was a lawful exercise by the State of its power to protect by police regulations the public health, and that it neither denied to persons within the jurisdiction of the State the equal protection of the laws, nor deprived them of their property without compensation, and was

not otherwise repugnant to the Fourteenth Amendment. Said Mr. Justice Harlan: "It [this court] cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to these objects. The court is unable to affirm that this legislation has no real or substantial relation to such objects." So, too, in *Plumley* v. *Massachusetts*, (155 U. S. 461,) a statute of Massachusetts prohibiting the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and so brought into the State, was decided not to be in conflict with the commerce clause of the Constitution.

These cases recognize the fact that intoxicating liquors belong to a class of commodities which, in the opinion of a great many estimable people, are deleterious in their effects, demoralizing in their tendencies, and often fatal in their excessive indulgence; and that, while their employment as a medicine may sometimes be beneficial, their habitual and constant use as a beverage, whatever it may be to individuals, is injurious to the community. It may be that their evil effects have been exaggerated, and that, though their use is usually attended with more or less danger, it is by no means open to universal condemnation. It is, however, within the power of each State to investigate the subject and to determine its policy in that particular. If the legislative body come deliberately to the conclusion that a due regard for the public safety and morals require a suppression of the liquor traffic, there is nothing in the commercial clause of the Constitution, or in the Fourteenth Amendment to that instrument, to forbid its doing so. While, perhaps, it may not wholly prohibit the use or sale of them for medicinal purposes, it may hedge about their use as a general beverage such restrictions as it pleases. Nor can we deny to the legislature the power to impose restrictions upon the sale of noxious or poisonous drugs, such as opium and other similar articles, extremely valuable as medicines, but equally baneful to the habitual user.

Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. With-

out undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other States, and there be no reason to doubt that the act in question is designed for the protection of the public health.

We have had repeated occasion to hold, where State legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the State legislature were as a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce. While, as was said in *Holden* v. *Hardy,* (169 U. S. 366, 392,) "the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests." Thus, while in *Railroad Co.* v. *Husen,* (95 U. S. 465,) it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican or Indian cattle into the State, was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the legislature chose to impose. (*Missouri &c. R. R. Co.* v. *Haber,* 169 U. S. 613.) So, too, although it was held in *Barbier* v. *Connolly,* (113 U. S. 27,) and in *Soon Hing* v. *Crowley,* (113 U. S. 703,) that a municipal ordinance prohibiting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void, if it conferred upon the municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected for carrying on business. (*Yick Wo* v. *Hopkins,* 118 U. S. 356.) In delivering the opinion Mr. Justice Matthews observed: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

We are therefore of opinion that although the State of Tennessee may not wholly interdict commerce in cigarettes it is not in the language of

Chief Justice Taney in the License Cases, "bound to furnish a market for it, [them] nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government."

2. There is no reason to doubt the good faith of the legislature of Tennessee in prohibiting the sale of cigarettes as a sanitary measure, and if it be inoperative as applied to sales by the owner in the original packages, of cigarettes manufactured in and brought from another State, we are remitted to the inquiry whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer? This we regard as the vital question in the case.

The whole law upon the subject of original packages is based upon a decision of this court, in *Brown* v. *Maryland*, (12 Wheat. 419,) in which a statute of Maryland, requiring all importers of foreign articles, "by bale or package," or of intoxicating liquors, and other persons selling the same, "by wholesale, bale or package, hogshead, barrel or tierce," to take out a license, was held to be repugnant to that provision of the Constitution forbidding States from laying a duty upon imports, as well as to that declaring that Congress should have power to regulate commerce with foreign nations. There was thought to be no difference between a power to prohibit the sale of an article while it was an import and the power to prohibit its introduction into the country. The one would be the necessary consequence of the other. No goods would be imported if none could be sold. But, in delivering the opinion of the court, Mr. Chief Justice Marshall observed: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to

import goods from foreign countries. It is safe to assume that it did not occur to the Chief Justice that, by a skilful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several States.

A casual remark, however, made by Chief Justice Marshall in that case, that "we suppose the principles laid down in this case to apply equally to importations from a sister State" was subsequently considered in *Woodruff* v. *Parham*, (8 Wall. 123,) and was held to have no application to commerce between the States, the court deciding that the term "import," as used in that clause, which declares that "no State shall levy any imposts or duties on imports or exports," did not refer to articles imported from one State into another, but only to articles imported from foreign countries into the United States. In that case an ordinance of the city of Mobile, authorizing a tax upon sales at auctions, was held to be applicable to products of States other than Alabama, although the articles were sold in the original and unbroken packages.

The principle of this case was subsequently applied in *Brown* v. *Houston*, (114 U. S. 622,) in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, became intermingled, on arrival there, with the general property of the State of Louisiana, and was subject to taxation under the laws of that State, although it might be, after arrival, sold from the vessel upon which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port. In delivering the opinion of the court Mr. Justice Bradley observed:

"It cannot be seriously contended, at least in the absence of any Congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the city of New York, for example, when the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, *still in the original packages*, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, *being there for the purpose of remaining there until used or sold*, and constituting part of the great mass of commercial capital—provided, always, that the assessment be a general one, and made without discrimination between goods the product of New York and goods the product of other States? Of course, the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States as such, or by reason of their so coming, would be a discriminating tax against them as imposts, and would be a regulation of interstate commerce, incon-

sistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But, if, after their arrival within the State—that being their place of destination for use of trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

The principle of this case was applied subsequently in that of *Pittsburgh &c. Coal Co.* v. *Bates*, (156 U. S. 577.)

In *Leisy* v. *Hardin*, (135 U. S. 100,) 122 quarter barrels of beer, 171 one-eighth barrels of beer and eleven cases of beer were seized by the city marshal of Keokuk under a State statute prohibiting the sale of intoxicating liquors. It was held that, being articles of lawful commerce, the State could not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State; or, when imported, prohibit their sale by the importer, and that they did not become a part of the common mass of property within the State so long as they remained in the casks in which they were imported and continued to be the property of the importer. No question was made with regard to the casks being original packages, or as to the fact that, according to the custom of brewers, beer was usually and ordinarily imported from one State to another in casks of this size.

In the still later case of *Schollenberger* v. *Pennsylvania*, (171 U. S. 1,) oleomargarine was recognized as a lawful article of commerce, and one which could not be wholly excluded from importation into a State from another State where it was manufactured, and so long as it remained in its original packages could be sold, notwithstanding a statute of the State prohibiting such sale. The oleomargarine in that case was imported and sold in packages of ten pounds weight; but it appeared in the special verdict that the package was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant."

Most pertinent to this case, and, as we think, covering its principle completely, is the opinion of this court in *May* v. *New Orleans*, (178 U. S. 496,) decided at the last term. This involved the validity of certain tax assessments made by the city of New Orleans upon the merchandise and stock in trade of the plaintiff, which consisted of dry goods imported from foreign countries, upon which duties had been levied by and paid to the

general government. The goods were put up and sold in packages, a large number of such packages being enclosed in wooden cases or boxes for the purposes of importation. Upon arrival at New Orleans the boxes were opened, the packages taken out and sold unbroken. The question was whether the box or case containing these packages, or the packages themselves were the original packages within the case of *Brown* v. *Maryland*, (12 Wheat. 419.) It was conceded that, so long as the packages remained in their original cases, they were not subject to taxation, but the court held that this immunity ceased as soon as the boxes were opened. As stated by Mr. Justice Harlan in delivering the opinion of the court (p. 508):

"In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the State. It was not a tax on the plaintiff's goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the State the plaintiffs stood, with respect to liability to State taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the government, and, in many instances, with the intent to protect the industries of this country against foreign competition."

The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the State cannot prohibit the sale in its original package of an article brought from another State, the size of the package is material, although some of the expressions in the License Cases seem to foreshadow the consequences likely to result from the argument of the defendant. Thus, it is stated by Mr. Justice Catron, (5 How. 608,) that "to hold that the State license law [of New Hampshire] was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequences of which would be that the dealers in New Hampshire would sell only spirits produced in other States, and that the products

of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire." And also in the opinion of Mr. Justice Woodbury, rendered in the same case (p. 625): "If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States, (except that in coasting, as before explained, to prevent smuggling,) anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or any internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity." These words are certainly prophetic in their applicability to this case.

Similar questions have arisen in the Federal courts of original jurisdiction, whose decisions have generally been in favor of the position taken by the plaintiff in error in this case. The same question has been considered in the courts of several States, and their decisions have been with almost equal unanimity the other way.

In *Commonwealth* v. *Zelt*, (138 Penn. St. 615,) a distiller manufacturing over the State line established a store or agency within the State, put up his liquors in bottles ranging in capacity from one quart down to one-half pint, and, packing them in unsealed barrels, sent them to the Pennsylvania store, where they were taken from the barrels, put upon the shelves and sold to customers. The question was submitted to the jury, which, as stated by the court, evidently regarded defendant's method as a trick and an evasion of the State statute. The judgment was affirmed. In *Commonwealth* v. *Schollenberger*, (156 Penn. St. 201,) (not the case reported in 171 U. S. 1,) an original package is defined to be "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling, and security in transportation of merchandise between dealers in the ordinary course of actual commerce." Where a mode of putting up a package is not adapted to meet the requirements of interstate commerce, but the requirements of an unlawful domestic retail trade, the dealer will not be protected on the ground that he is selling an original package. The opinion contains a very vigorous denunciation of the methods resorted to by this class of dealers. The following paragraphs are sufficiently illustrative of the general purport of the decision: "Intrenched behind the interstate commerce clause so construed, citizens of other States could prey upon our people, trample upon our laws, and make gain out of a traffic forbidden to our citizens only to be delivered up absolutely and unconditionally to them. It would require only that such citizen of another State should

establish a local store in some of our towns and cities, or in all of them, conduct a local business, to meet a local demand, and, when called upon by the officers of the law, make the reply that he made the goods in some other State, and, as a manufacturer, supplied himself, as a local dealer, with wares of a foreign origin. Neither the foreign origin of the goods sold, nor of the seller, nor of both together, will convert a business that is local and intrastate into one that is general and interstate within the meaning of the Constitution of the United States. . . . One who plants his foot squarely upon the police laws of this State and defies its officers to suppress or to punish his unlawful trade, must show a clear legal right to take and maintain his position as a public enemy, or suffer the penalty of the broken law. To hold otherwise would make it impossible for the people of any State to protect themselves from evils that by common consent throughout the civilized world need to be restrained and removed by suitable legislation. It would also strike a blow of absolutely crushing weight at the existence of the police power in the several States, and render all attempts at its exercise ineffectual and useless."

In the case of *Commonwealth* v. *Bishman*, (138 Penn. St. 639,) defendant sold liquor in pint and quart bottles, each of which was enclosed in a pasteboard box, sealed with a strip of paper pasted across the lid, and stamped with the name of the firm. These packages were shipped in boxes and barrels to defendant's agent, who unpacked them when they arrived, and placed the pasteboard packages on his shelves. The court held that there was abundance of evidence to submit to the jury whether the whole matter was not a scheme to evade the license laws. Said the court: "The defendant was engaged in selling liquor at retail, and his claim that he was selling only original packages was little better than a burlesque."

In *Commonwealth* v. *Paul*, (170 Penn. St. 284,) a small tub of oleomargarine, containing ten pounds, prepared in another State and brought into Pennsylvania to be sold unbroken to a customer for his use as an article of food upon his table, and actually so sold, was held not to be an original package within the meaning of the law relating to interstate commerce. Said the court: "If a pint bottle of whiskey is an original package under the protection of Congress, and can be sold as such, regardless of the police legislation of the State, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce, intended to guard against stoppage along State lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any State, if the things sold have come into the retailer's store from a non-resident manufacturer

or shipper. . . . Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another State, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate interstate commerce, and set the police laws of the State at defiance?"

In *Haley* v. *Nebraska*, (42 Neb. 556,) the same result was reached upon precisely the same state of facts; as well as in *State* v. *Chapman*, (1 South Dak. 414;) and *Smith* v. *State*, (54 Ark. 248.)

In *McGregor* v. *Cone*, (104 Iowa, 465,) the question arose as to packages of cigarettes of the same size as those involved in the present case. These packages were placed in a common pine box for convenience of shipment without any other packing or enclosure about the packages, and were shipped by the company from its factory in New York to its warehouse in Chicago, and thence to the defendant's place of business in Iowa. Upon the arrival of the box the defendant opened the box by taking the lid off, and sold one of the packages containing cigarettes. It was held that the pine box was the original package, and that the defendant was liable, notwithstanding that the internal revenue department had, for the purposes of taxation, declared the small packages sold by defendant to be original packages. This case seems to have overruled the cases of *State* v. *Coonan*, (82 Iowa, 400;) *Collins* v. *Hills*, (77 Iowa, 181;) *Hopkins* v. *Lewis*, (86 Iowa, 638;) *State* v. *Miller*, (84 Iowa, 690,) where a contrary view was expressed.

The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words "original package" in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore

arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarrette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities.

There could hardly be stronger evidence of fraud than is shown by the facts of this case, which we quote from the opinion of the court:

"The defendant purchased from the American Tobacco Company, at its factory, in Durham, North Carolina, a lot of cigarettes manufactured by that company at that factory, and there by it put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that after defendant's purchase the American Tobacco Company piled upon the floor of its warehouse, in Durham, North Carolina, the number of boxes or packages sold, and, having done so, notified the Southern Express Company to come and get them, and said company, by its agent, took them from the floor and placed them in an open basket already and previously in the possession of the Southern Express Company, and in that basket had them transported by express to the defendant's town in Tennessee, and there an agent of the same express company took the basket to defendant's place of business and lifted from it on to the counter of the defendant the lot of detached boxes or packages of cigarettes, and thereupon took a receipt and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages without breaking it, and for that sale he stands convicted."

And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge, to which this court ought not to lend its countenance. If there be any original package at all in this case we think it is the basket and not the paper box.

Suppose the State of Tennessee in the exercise of its police powers should prohibit the manufacture within its limits of cigarettes, whether they were manufactured to be sold in that State, or to be sent to other States for sale, could the validity of such legislation be questioned, as in violation of the Constitution of the United States, upon the ground that it infringed the liberty which is secured to the citizens by the Fourteenth Amendment? "The liberty mentioned in that amendment," this court has said, "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (*Allgeyer* v. *Louisiana*, 165 U. S. 578, 589.)

There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a State, with reference to its own people, to declare, under penalties, that cigarettes should not be manufactured within its limits. No one could say that such legislation trenched upon the liberty of the citizen by preventing him from pursuing a lawful business. Now the result of defendant's argument in this case is that citizens of Tennessee may, under the commerce clause of the Constitution of the United States, bring into that State from other States cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation. In other words, it is decided, that the commerce clause of the Constitution, by its own force, without any legislation by Congress, overrides the action of the State in a matter confessedly involving, in the judgment of its legislature, the health of its people. We cannot accept this view. The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the State to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction

into the State, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one State from another State, then the action of a State by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of power to regulate commerce should override the power reserved by the States to pass laws that had substantial relations to the health of their people. Of course, it is one thing to force into a State, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force into the markets of a State, against its will, articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health.

Practically the only argument relied upon in support of the theory that these packages of ten cigarettes are original packages is derivable from the Revised Statutes, section 3392, which requires that manufacturers shall put up all cigarettes made by or for them, and sold or removed for consumption or use, in packages containing ten, twenty, fifty or one hundred cigarettes each. This, however, is solely for the purpose of taxation—a precaution taken for the better enforcement of the internal revenue law, and to be read in connection with section 3243, which provides that "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State." As was said in *Plumley* v. *Massachusetts*, (155 U. S. 461, 466,) it is manifest this section was adopted to make it clear that Congress had no purpose to restrict the power of the State over the manufacture and sale of particular articles. "The taxes prescribed by that act were for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture and sale." The question is not in what packages the law requires the cigarettes to be packed for the purpose of taxation, but what are the packages in which they are usually transported from one State to another where the transaction is *bona fide* and for the legitimate purposes of trade and commerce.

We are satisfied the conclusion of the Supreme Court of Tennessee was correct, and it is therefore

Affirmed.

Supreme Court of the United States.

No. 25.—October Term, 1900.

W. B. Austin, Plaintiff in Error, vs. The State of Tennessee. } In error to the Supreme Court of the State of Tennessee.

[November 19, 1900.]

Mr. Justice White concurring:

I do not understand that anything in the opinion of the court impairs the doctrine protecting original packages from interference by the police or any other power of a State, as announced by so many opinions of this court, especially as expounded in *Leisy* v. *Hardin*, (135 U. S. 100,) and *Rhodes* v. *Iowa*, (170 U. S. 412,) and the authorities which are cited in the opinions of the court in both of those cases. If I thought either the opinion of the court just announced or the conclusion which it reaches had the effect of weakening the doctrine upheld by the authorities to which I have just referred, I should be unable to concur. Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 25.—October Term, 1900.

W. B. Austin, Plaintiff in Error, vs. The State of Tennessee. } In error to the Supreme Court of the State of Tennessee.

[November 19, 1900.]

Mr. Justice Brewer, with whom concurred the Chief Justice, Mr. Justice Shiras and Mr. Justice Peckham, dissenting:

I dissent from the opinions and judgment in this case. The plaintiff in error was convicted of a violation of the following act of the General Assembly of Tennessee:

"Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than fifty dollars."

The facts shown by the testimony, as appears from the record, are as follows:

"This defendant was on the 1st day of November, 1897, a resident of and merchant in the town of Madisonville, said Monroe County, Tennessee, and in no way connected with the American Tobacco Company, as agent or otherwise; that just prior to said November, 1897, the defendant purchased, in the State of North Carolina, from the American Tobacco Company, a corporation of the State of New Jersey, and having a factory for the manufacture of cigarettes in Durham, N. C., and similar factories at other points in the United States, but having no factory, office, nor warehouse in the State of Tennessee, a number of packages, each containing 10 Duke of Durham cigarettes; that these cigarettes were manufactured by the American Tobacco Company at its factory in said town of Durham, and were packed by it in quantities of 10 in pasteboard slide-boxes, upon each of which such box or package were printed the names of the manufacturers of the cigarettes therein contained, the name or brand of the cigarettes therein contained, the number of the factory and internal revenue collection or manufacturing district in which said factory was located, the number of cigarettes contained in the box or package, the caution notice required by the laws of the United States, the internal revenue stamp for 10 cigarettes pasted across the end of such box or package, so as to act as a seal thereon and thereof, and which had to be broken and destroyed to open said box or package, and all the other requirements of the laws and regulations of the United States governing the packing and sale of cigarettes. A package in all respects similar to

those bought by defendant at Durham, N. C., is hereto attached, marked 'Exhibit A.' These packages were packed and manufactured by said American Tobacco Company at Durham, N. C., and were by it shipped from said town of Durham, N. C., to defendant by the Southern Express Company, without case, covering, or enclosure of any kind around or about any of said packages, but were by said American Tobacco Company piled upon the floor of its warehouse in Durham, N. C., and said Southern Express Company notified to come and get them, and said express company, by its agent, took them, the said enclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company; that these packages were brought to the place of business of defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket on to the counter in the place of business of defendant, and so delivered to and receipted for by the defendant; that said basket was not left with defendant at all, but was carried away from defendant's business by said agent of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without breaking, and sold one of them on said November 1, 1897, to W. G. Brown, an adult resident of said Monroe County, Tennessee, said sale being in Monroe County, Tennessee, and within one year before the finding of this indictment."

Upon these facts the Supreme Court of Tennessee sustained the conviction, and thereupon the defendant sued out this writ of error. His contention is that the act is, as applied to the importation of cigarettes and subsequent sale thereof in the packages in which they were imported, in conflict with the Constitution of the United States.

It will be perceived that the statute in terms expressly prohibits the sale of cigarettes, or the bringing them into the state for the purpose of sale. If valid, it not only prohibits an individual within the State from selling cigarettes manufactured therein, but also prohibits any one bringing cigarettes from another state into Tennessee for the purpose of sale. It will, therefore, stop all importations of cigarettes for sale, and the only permissible importations will be those for personal use. The power of the state, therefore, to put an end to commerce between other states and itself, except so far as the importation is for the use of the importer, is broadly and distinctly asserted by this statute. Claiming the right to determine absolutely what shall be sold within its limits, Tennessee attempts to prohibit the sale, or the importation for sale, of cigarettes. As said by its Supreme Court: "The statute under which the conviction was had unconditionally prohibits all sales of cigarettes, whether manufactured in this state or elsewhere."

It may be well to consider what this statute is not. It has none of the elements of inspection. It does not attempt to distinguish between cigarettes made of tobacco free from any drug, wrapped in paper untouched by any poison, from those (of which we are assured by

counsel in their argument there are many) whose tobacco has been mixed with opium or some other drug, and whose wrapper has been saturated in a solution of arsenic. There is no attempt to distinguish between the pure and impure; no attempt to protect a purchaser from the purchase of an adulterated article. On the contrary, it stamps tobacco wrapped up in the form of a cigarette as in and of itself noxious, and to be wholly forbidden. The Supreme Court of Tennessee rightly interpreted this statute as an absolute prohibition of the sale of cigarettes, no matter what the character of the paper wrappers or the condition of the tobacco within them, and it asserted the power of the state to enact the statute on the ground that cigarettes are "inherently bad, and bad only." I quote from its opinion:

"Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.

"There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true, (*Schollenberger* v. *Pennsylvania*, 171 U. S. 1; 1 Greenl. Evi. sec. 6; 1 Whart. Evi. sec. 282; 1 Jones' Evi. secs. 129 and 134; *Lanfear* v. *Mestier*, 18 La. An. 497; *S. C.*, 89 Am. Dec. 658 and note 693; *State* v. *Goyette*, 11 R. I. 592; *Watson* v. *State*, 55 Ala. 158); nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them. (*Boullemet* v. *State*, 28 Ala. 83; 12 Am. & Eng. Enc. L. 199.)

"It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other reason.

"It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction of the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea and alone for the protection of the people of the state from an unmitigated evil."

No one can question the sincerity of the legislature of Tennessee in thus enacting what it deemed for the health of its citizens, or the conviction of the members of its Supreme Court of the validity of such legislation by reason of the greatness of the supposed evil which it was intended to restrain. And yet there is no consensus of opinion as to the fact of such

evil. As illustrative of which statement see the articles in the Medico-Legal Journal of March and September, 1898, and the large collection therein of the opinions of medical and other scientific gentlemen in respect to the matter. Further, the report for 1899 of the Commissioner of Internal Revenue (p. 436) shows that the number of cigarettes manufactured in the United States during the year 1899 were two billion eight hundred and five million one hundred and thirty thousand seven hundred and thirty-seven, (2,805,130,737,) on which the government collected a tax of four million two hundred and thirteen thousand two hundred and fifteen dollars and twenty-five cents, ($4,213,215.25.) These figures are enormous, and in addition this fact may be noted, a fact obvious to all who have had occasion to travel in other countries, (particularly those occupied by different branches of the Latin race,) that the use of cigarettes is there far more common than in this country.

In view of these and other facts it is perhaps not surprising to find Mr. Justice Brown, speaking for himself and three associates, stating "we are not prepared to fully endorse the opinion of that court" (Supreme Court of Tennessee) "that cigarettes are not legitimate articles of commerce," or that "they are inherently bad, and bad only." The truth is that, whatever differences of opinion may exist as to whether cigarettes are or are not hurtful, they are confessedly a common and well recognized article of commerce, and as such when the subject of interstate commerce are under the control of that body to which by the Constitution of the United States is given the power to regulate commerce between the states.

It will be seen by an inspection of the opinion of the Supreme Court of Tennessee that that court sustained the conviction on two grounds: First. That cigarettes were not a legitimate article of commerce, and therefore the State of Tennessee by virtue of its police power had a right to prohibit absolutely their importation and sale, no matter in what form they were so imported and sold; and, secondly, that if it had no such general power it could prohibit the importation and sale of cigarettes in packages of the size in which these were imported and sold. In view of the adherence by Mr. Justice White to the opinions heretofore announced by this court in *Leisy* v. *Hardin*, (135 U. S. 100,) and other cases in respect to the inability of the state by virtue of its police power to prohibit the importation and sale in original packages of articles, which are recognized articles of commerce although the subjects of conflicting opinions as to the deleteriousness of their use, it would seem unnecessary to enter into any lengthy consideration of the first ground. Especially is this so inasmuch as there is no expressed attempt to overrule *Schollenberger* v. *Pennsylvania*, (171 U. S. 1,) decided two years ago last May, in which decision three of the justices concurring in the affirmance of the judgment herein concurred, and in which it was distinctly ruled (p. 23): "In the

absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." Although it may be noticed in passing that this case, as decided by the Supreme Court of Pennsylvania, where it is reported under the title, *Commonwealth* v. *Paul*, 170 Pa. St. 284, (see 171 U. S. 5,) is both cited and quoted from in support of this decision. A ruling we have reversed is the authority now relied upon. Inasmuch however as Mr. Justice Brown, in his opinion, has, in addition to this citation, quoted some expressions which may seem to tend towards giving an enlarged scope to the police power of the state, it may not be a waste of time to show concisely what this court has decided, and what may, therefore, now be considered settled law.

In the first place, Congress has supreme and exclusive control over interstate commerce. I shall not attempt to restate the oft-repeated historical argument that one of the chief reasons leading to the formation of the Federal Constitution was the necessity, disclosed by the experience of the colonies under the confederation, of preventing any discriminating or retaliatory legislation by any state in respect to the commodities produced or manufactured in another, and the consequent importance of having commerce between the states placed absolutely within the control of a legislative body representing all the states. And yet it may not be out of place to quote these words from the concurring opinion of Mr. Justice Johnson, in *Gibbons* v. *Ogden*, (9 Wheat. 1, 224):

"For a century the states had submitted, with murmurs, to the commercial restrictions imposed by the parent state; and, now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the states, and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of a convention."

And these from Chief Justice Marshall, in *Brown* v. *Maryland*, (12 Wheat. 419, 446):

"It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states."

The plain language of the Constitution affirms this. Second only to the power "to collect taxes" and "to borrow money" is the power given to Congress by section 8, article 1, of the Constitution "to regulate com-

merce with foreign nations, and among the several states, and with the Indian tribes." Thus next in order, as though next in importance to the power of maintaining itself by taxation and borrowing money, is the power to regulate commerce between the states as well as between the United States and foreign nations.

While this nation is as between it and the states one of enumerated powers, it is within the scope of those enumerated powers supreme, and, as the power to regulate commerce between the states is expressly given to Congress, and no division provided for, it follows that it is wholly withdrawn from state control; and such has been the uniform ruling of this court. In the case just quoted from, *Gibbons* v. *Ogden*, Chief Justice Marshall, delivering the opinion of the court, on page 196, thus declared the scope and limit of that power:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

And in the other case referred to, *Brown* v. *Maryland*, on page 446, the Chief Justice put this question and gave this answer:

"What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

"This question was considered in the case of *Gibbons* v. *Ogden*, (9 Wheat. 1,) in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior."

In *The Passenger Cases*, (7 How. 283,) Mr. Justice McLean, after referring to many prior cases, to the discussions in the convention which formed the Constitution, and the language, among others, of Mr. Madison in that discussion, that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority," summed up his conclusion in these words (p. 400):

"Whether I consider the nature and object of the Commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons* v. *Ogden*, (9 Wheat. 1,) reiterated in *Brown* v. *Maryland*, (12 Wheat. 419,) and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power 'to regulate commerce with foreign nations, and among the several states,' by the Constitution, is exclusively vested in Congress."

In *The Head Money Cases*, (112 U. S. 580, 590,) Mr. Justice Miller, considering a statute passed by Congress requiring the master or owner of every vessel bringing immigrants into the United States to pay a tax of fifty cents for each immigrant, to create a fund for the expense of regulating immigration, the care of immigrants and for the relief of such as were in distress, and holding that it constituted a regulation of commerce, said in reference to it and other like statutes:

"That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the states. That decision did not rest in any case on the ground that the state and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the states and the general government, has conferred this power on the latter to the exclusion of the former."

In *Leisy* v. *Hardin*, (135 U. S. 100, 108,) Chief Justice Fuller thus stated the rule:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' is the power to prescribe the rule by which their commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

I might multiply quotations like these, but it is unnecessary. See the following among other cases for like affirmations: *United States* v. *Coombs*, 12 Pet. 72, 78; *Case of the State Freight Tax*, 15 Wall. 232, 279, 281; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 10; *Mobile* v. *Kimball*, 102 U. S. 691, 696, 697, 699, 700, 702; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Telegraph Company* v. *Texas*, 105 U. S. 460, 466; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 60; *Moran* v. *New Orleans*, 112 U. S. 69, 72, 73; *Ferry Company* v. *Pennsylvania*, 114 U. S. 196, 204, 211; *Brown* v. *Houston*, 114 U. S. 622, 630, 631, 632; *Philadelphia Steamship Company* v. *Pennsylvania*, 122 U. S. 326, 336; *In re Rahrer*, 140 U. S. 545, 554, 555.

The power of Congress to regulate commerce between the states being, as we have seen, supreme, its failure to impose any restrictions or regulations is to be taken as a declaration that, in its judgment, such commerce shall be free. There is no necessity of an affirmative declaration on its part, for, as it alone has power to restrict or prescribe regulations, its

failure to do so leaves the commerce unburdened. This, too, is a proposition which has been so often declared by this court as to be one of the settled rules of constitutional law. Thus, in *Welton* v. *Missouri*, (91 U. S. 275, 282,) it was said:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

In *Robbins* v. *Shelby Taxing District*, (120 U. S. 489, 493,) Mr. Justice Bradley summed up the matter in these words and with these citations:

"Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons* v. *Ogden*, (9 Wheat. 1, 222,) by Mr. Justice Grier in *The Passenger Cases*, (7 How. 283, 462,) and has been affirmed in subsequent cases. (*State Freight Tax Cases*, 15 Wall. 232, 279; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631; *Walling* v. *Michigan*, 116 U. S. 446, 455; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557.)"

See also *Bowman* v. *Chicago & Northwestern Ry. Co.*, (125 U. S. 465;) *Leisy* v. *Hardin*, *supra*; *Covington &c. Bridge Co.* v. *Kentucky*, (154 U. S. 204.)

In this case the words of Mr. Justice Brown were, page 212:

"But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled."

It is true there are many cases in this court in which have been sustained acts of a state which do in a measure affect interstate commerce, but the thought underlying those cases has been that the acts complained of were not direct regulations of interstate commerce, not in restriction but in furtherance of it, and being purely local in character might rightfully be upheld until Congress should by its legislation direct the contrary.

That the transportation from one state of its products into another state for purposes of sale is not a matter of purely local interest to the latter state is evident. It concerns the right of the producer or manufacturer in the former state to his market. We are told by the learned attorney general of Tennessee, as an evidence of the good faith of the state in this legislation, that it has many areas of territory especially valuable for the growth of tobacco, and that it is one of the large tobacco producing

states in the nation. That is, therefore, a valuable industry in Tennessee. Suppose the legislatures of all the other states should become possessed of the idea that the use of tobacco was injurious, and prohibit the importation and sale thereof. Could it fairly be said that such legislation was in respect to a matter of only local interest in the seperate states passing such legislation? Could not Tennessee rightfully contend that it was a matter affecting one of its large industries, and which was likely to be destroyed by such adverse legislation?

It is undoubtedly true that the police power is not by the Constitution delegated to Congress. It may, therefore, under article 10 of the amendments, be regarded as reserved to the States respectively, or to the people, but it is equally clear that no power which is impliedly reserved to the states can limit or detract from the full scope of any power expressly delegated to the nation, to be exercised by Congress. In other words, the state cannot in the exercise of the police power interfere with the supreme control by Congress over interstate commerce. This has been repeatedly affirmed by this court. In *Henderson* v. *Mayor of New York*, (92 U. S. 259, 271,) it was said by Mr. Justice Miller:

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution."

In *Railroad Company* v. *Husen*, (95 U. S. 465, 471, 472,) it was said by Mr. Justice Strong:

"But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. . . . It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

Again, by Mr. Justice Harlan, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, (115 U. S. 650, 661):

"Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

Again, in reference to quarantine laws, by Mr. Justice Miller, in *Morgan Steamship Co.* v. *Louisiana*, (118 U. S. 455, 464):

"For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in

this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Henderson* v. *The Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661.)"

Further may well be quoted the words of Mr. Justice Catron in the *License Cases*, (5 How. 504, 599,) quoted with approval in *Bowman* v. *Chicago &c. Ry. Co.*, (125 U. S. 465, 489,) and again referred to with like approval in *Leisy* v. *Hardin*, (135 U. S. 100, 113,) and also in *In re Rahrer*, (140 U. S. 545, 557):

"The assumption is that the police power was not touched by the Constitution, but left to the states, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and Congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power, that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *The State of Maryland* and *New York* v. *Miln*. What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the states, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which

may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

See also *Minnesota* v. *Barber*, (136 U. S. 313;) *Brimmer* v. *Rebman*, (138 U. S. 78;) *Crutcher* v. *Kentucky*, (141 U. S. 47;) *Voight* v. *Wright*, (141 U. S. 62;) *Gulf, Colorado & Santa Fe Ry. Co.* v. *Hefley*, (158 U. S. 98.)

We have thus, first, the express language of the Constitution delegating to Congress the power "to regulate commerce . . . among the several states;" second, the repeated rulings of this court that that power is supreme and exclusive; third, an equal volume of decision that the failure of Congress to prescribe any limitations to interstate commerce in respect to any particular article is equivalent to a declaration by that body that it intends that such commerce shall be free; and, fourth, the equally often repeated ruling that the reserved police power of the states is subordinate to and does not limit or take from the supreme control by Congress over matters of interstate commerce.

It would seem from this concurrence of rulings that the decision in *Leisy* v. *Hardin*, *supra*, had now become the settled law, and that henceforth it is not to be questioned; that no state can, under the guise of a police regulation, directly restrain the importation and sale of articles brought in from other countries and other states, which are recognized articles of commerce, no matter what may be the local opinion as to the injurious effects of the use of such articles. The opinion of the Supreme Court of Tennessee on the first proposition suggested must, therefore, be considered as definitely overruled.

I pass now to the second proposition, which is that the packages in which these cigarettes were imported are so small, or the manner of their importation so peculiar, that the power of Congress over interstate commerce is as to them lost and the power of the state has become controlling. That this is the question upon which alone the reversal is ordered is evident, for it is said by Mr. Justice Brown, in his opinion, after referring to the matter of the police power:

"We are remitted to the inquiry whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the state while in the hands of the importer? This we regard as the vital question in the case."

And by Mr. Justice White, in his concurring opinion:

"Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is: Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court?"

I come to the consideration of this question with the conceded fact that Congress has supreme and exclusive control over interstate commerce; that no state in the exercise of its police power can directly restrain such commerce; and inquire why the size of the package or the manner of importation determines the limit of national control?

And first as to the matter of size, we are told that the cigarette package is three inches in length and one and a half inches in width, and contains ten cigarettes. I have no doubt of the accuracy of this measurement, but I in vain search the Constitution of the United States for any intimation that the power of Congress over interstate commerce ceases when the packages in which that commerce is carried on are of any particular size. Mr. Justice Brown quotes this language of Chief Justice Marshall, in *Brown* v. *Maryland*, (12 Wheat. 419,) wherein, having adverted to the fact that the importer might after the importation so break up the packages, or so handle the goods, as to show an intent to incorporate them into the mass of the general property of the state, he says:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

And upon this quotation this observation is made:

"This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so forcible a structure has been attempted to be erected in subsequent cases."

And yet, curiously enough, after this declaration, although the cigarettes sold by the defendant were "in the original form or package in which they were imported," although there had been no breaking of any package, it is held that the power of the nation does not protect him in that sale. Necessarily, there is impliedly added to the language of the Chief Justice words like these, "provided such package be of considerable size, at least larger than three inches in length and one and a half inches in width." Of all the justices of this court, Chief Justice Marshall has hitherto been credited with marvelous accuracy of statement, but it would seem from the construction now given that he omitted a most important particular in defining the relative powers of the nation and the state. Even now there is a singular failure to give the size of the package which takes the importation out of the power of Congress and entrusts it to the control of the state. Recently, in *Schollenberger* v. *Pennsylvania*, *supra*, we held that an importer had a right to import oleomargarine in ten-pound packages, and sell it in such a package at retail to a consumer.

Apparently, the dividing line as to the size of packages must be somewhere between that of a ten-pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds, in order to be within the protecting power of the nation, be carried from state to state in ten-pound packages?

If it be said that diamonds are not a subject of police regulation, and that a different rule obtains in reference to them than to matters of police regulation, (as might be implied from the scope of the opinion,) I can only say that the conclusion seems to me strange. Concretely, it amounts to this: The police power of the state, the power exercised to preserve the health and morals of its citizens, may prevent the importation and sale of a pint of whiskey, but cannot prevent the importation and sale of a barrel; or, in other words, the greater the wrong which is supposed to be done to the morals and health of the community, the less the power of the state to prevent it. That may be constitutional law, but to my mind it lacks the saving element of common sense. I see no logical half way place between a recognition of the power of the nation to regulate commerce between the states in all things which are the subjects of commerce (in whatever form or manner they may be imported) and a concession of the power of the state to prevent absolutely the importation and sale of articles deemed by it prejudicial to the health or morals of its citizens. Either the state has, in the exercise of its police power, the right to prohibit the importation and sale of articles deemed by it injurious to the health and morals of the community—no matter in what size or form of package the importation is made—or else it has no such power, and the determination of the question of importation and sale is one to be left to Congress. The attitude of one who affirms the supreme power of the nation over interstate commerce, including therein the right of Congress to regulate the importation and sale in large packages of things whether or not deemed by any state deleterious in their use, and yet holds that that supreme power of Congress is exhausted the moment the importation is in a package of small size, finds something of a parallel in the attitude of the citizen of a state, which has adopted prohibition, who upholds the law, but objects to its enforcement.

The size of the package seems to be the troublesome matter in the minds of some of my brethren. Let me put that question of size to this test. Suppose Congress, assuming that it had power over interstate commerce, should enact that all transportation of cigarettes between states should be in packages of ten cigarettes each, would that be a regulation of interstate commerce? Or would my brethren say that that was beyond the power of Congress? The power of Congress over commerce between the states is given in the same section and in the same language as its power over commerce between this nation and foreign nations. Is this court

prepared to say that, if Congress should enact that no importations of cigarettes from abroad should be otherwise than in packages of ten cigarettes each, such legislation was beyond its power because it affected a package of a small size? Mr. Justice White, evidently appreciating the logic of these suggestions, escapes their force by this declaration, and I quote from his opinion that which succeeds the quotation heretofore made:

"I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package."

I regret that the decision of a great constitutional question like that here presented turns on the shifting opinions of individual judges as to the peculiar facts of a particular case. No one can tell from this annunciation where is the dividing line between the power of the state and the power of the nation. Obviously the mere size of the package does not in this view determine. It would seem that constitutional limitations should be stated by the courts with precision. I think, and I say it with all respect, that no case involving a constitutional question should be turned off on the simple declaration that upon its peculiar facts it falls on one side or the other of some undisclosed line of demarcation. It seems to me, and yet I speak hesitatingly, in view of the indefiniteness of his declarations, that Mr. Justice White thinks there was something in the conduct of this importer in evasion of the state statute. But can any statute be deemed to be evaded which has no application to the particular matter? If the regulation of interstate commerce is a matter within the sole jurisdiction of Congress, surely no act of the state restraining an importation and sale can have any application thereto. If the state may not say whether the importation shall be in large or small packages, if that is a regulation of interstate commerce within the sole power of the United States, then no act of the importer in fixing the size of the package can be adjudged either in conflict with or an evasion of any state statute. There is but one of two alternatives. Either the state may regulate the size of the package or Congress has the power. If a state has the right, then of course it may prevent the importation of packages other than those of a large size; but if Congress alone can regulate it, then the state has nothing to do with the question of the size of the package, and no act of the importer in fixing the size of the package can be adjudged in conflict with its statute.

Congress has prescribed the sizes of the packages in which cigarettes are to be put up, and while it is true, as indicated in *Plumley* v. *Massachusetts*, (155 U.S. 461,) that the primary purpose of such legislation is the collection of internal revenue taxes, and not the regulation of commerce between the states, yet it is also true that it is not within the power of the states to declare that the use of packages of the size prescribed by Congress is illegitimate. There cannot be imputed to Congress the purpose to in any way interfere with the full power of the states over matters committed to their care, nor can the use by an individual of packages such as Congress has authorized be condemned as an evasion of state laws. The use of such a package legitimate for one purpose is legitimate for others, and a state by its statutes cannot in any way nullify or weaken the effect of Congressional enactment. So although these packages are small in size, they have the approbation of Congress and must be considered as legal, and their use cannot be made illegal by state laws.

And here it is well to refer to the language of Chief Justice Marshall, quoted, *supra*. It is: "In the original form or package in which it was imported." Not in which "it might have been" or "ought to have been imported." Obviously, it did not occur to him that the form or package which the importer might adopt in any way affected the power of Congress over the importation. One will search the opinion of the Chief Justice in vain to ascertain the size or form of the package then before the court. If Congress should see fit to describe a form or package, it was within its power. If it did not do so, it left the matter to the determination of the importer. There seems to be in the minds of those of my brethren with whom I differ the thought that, because this importer did not import in a customary way, the control of Congress in the matter ceased. The cost of transporting a single package of cigarettes from the manufactory in Durham, N. C., to any part of Tennessee may be great, and therefore such transportation is not ordinarily undertaken. It may be true, and undoubtedly is true, that a manufacturer of yeast cakes in the city of New York would not feel warranted in going to the expense of shipping a single yeast cake, or, for that matter, a hundred, to Covington, Ky., and yet that same individual, if he had a manufactory in Cincinnati, might find that the most convenient and inexpensive way of filling orders from Covington was to send them in separate packages in his delivery wagons across the bridge from the one city to the other. In each case the transportation would be one of interstate commerce, and it cannot be possible that Congress has the power to regulate the transportation from New York to Covington and not that from Cincinnati to Covington.

Another matter which must not be ignored in measuring the control of Congress over interstate commerce is the changes in the modes of transportation. At the time that Chief Justice Marshall wrote the

opinion in *Brown* v. *Maryland* transportation was carried on by water in sailing vessels and by land largely in lumber wagons. It is not strange that at such time all transportation was of goods packed in large boxes, securely fastened to prevent accidents from the rough and tumble way of transportation. There were then no express companies for carrying small packages. All that mode of transportation has grown up in this country within the last sixty years, but the express companies carrying their small packages from state to state are just as certainly engaged in interstate commerce as the old-fashioned lumber wagons carrying commodities between the same places. The facilities of transportation are increasing rapidly, and with them the cost of such transportation is diminishing, so that more and more will it be true that the smallest packages will be the frequent subject of transportation, even between state and state. But it has often been said that the grants of power in the Constitution to the national government were expressed in such broad and general language that, notwithstanding the many changes in the modes of doing business, in the forms and conditions of social life, the needed control was still found to be vested in Congress. Can it be that an exception to this rule is now to arise in the matter of the full and complete power given by that instrument to Congress over interstate commerce?

Again, let me go back to the opinion of Chief Justice Marshall, and quote pages 439–446:

"There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold.

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"If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

Now, if cigarettes cannot be brought into the State of Tennessee and sold in the packages in which they were manufactured, but must be brought in and sold only in barrels or boxes of large size, the right of importation is practically defeated, for no consumer would buy a barrel or box for his own use, and no importer could sell it to a second party with the idea of

a resale, because the moment the first sale is accomplished, the law of the state interposes to prevent the second. In other words, this contention that an imported package must be of a large size in order to secure the right of sale is simply a convenient way of declaring that the right of importation for purposes of sale may be denied. Not such was the thought of this court, as expressed in the opinion of Chief Justice Marshall. The idea then was that the right of sale was an incident to the right to import; that the state could neither directly forbid the importation, nor indirectly prevent it by embarrassing the right of sale with restrictions which, in fact, stop all importation for purposes of sale.

I do not doubt that the importation and sale of many things may wisely be restrained, but the question is as to the body by which such regulations shall be made. We may all agree that the importation and sale of liquors should be restrained or prohibited. We may doubt as to whether a like rule obtains as to the importation and sale of oleomargarine. Believing that the settled ruling of this court has been that that question is one to be determined by Congress, I think that this decision is a plain departure therefrom.

Nor is there reason to apprehend that any unfortunate results will flow from the supreme power of Congress in the matter. Take the case of intoxicating liquors. When it was found by the decision in *Leisy* v. *Hardin*, *supra*, that interstate commerce in such liquors (they being recognized articles of commerce) could not be regulated by the states, Congress promptly passed an act providing that liquors imported into any state should upon arrival therein be subject to the local laws, (26 U. S. Stat. 313, c. 727,) the validity of which legislation was sustained in *In re Rahrer*, (140 U. S. 545.) So it cannot be doubted that if that body which represents all the states shall be of opinion that the use of any particular article is freighted with injury to public health, morals or safety, it will absolutely prohibit interstate commerce therein, or if in its judgment (as in the case of intoxicating liquors) there is in certain localities such a feeling in reference to any article that commerce therein may wisely be regulated by the state, it will provide therefor. Although some temporary disadvantage or inconvenience may result from this assertion of the supremacy of Congress, it is not fitting, in view of the constitutional provisions, to ignore or limit the full scope of that supremacy; and, it may properly be added, it is better that in certain instances one state should be subjected to temporary annoyance rather than that the whole framework of commercial unity created by the Constitution should be destroyed by relegating to each state the determination of what particular articles it will permit to be imported into its borders.

"The power cannot be conceded to a state to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without Congressional permission.

The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances." (*Lyng* v. *Michigan*, 135 U. S. 161, 166.)

For these reasons I dissent from the opinions and judgment in this case.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice SHIRAS and Mr. Justice PECKHAM concur in this dissent.

True copy.

Test:

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